

JUDGE ADVOCATE GENERAL









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Judge Advocate General

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Minister of National Defence National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2

Dear Minister,

I am pleased to present you the 21st Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Armed Forces, made pursuant to section 9.3 of the *National Defence Act*. This report covers the period of 1 April 2019 to 31 March 2020.

Yours Truly,

Rear-Admiral Geneviève Bernatchez

Judge Advocate General

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COMMUNIQUÉ

It is with great pleasure that I present my third Annual Report to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces. This report covers the period of 1 April 2019 to 31 March 2020, and is submitted in accordance with subsection 9.3(2) of the *National Defence Act*.

Pursuant to sections 9.1 and 9.2 of the *National Defence Act*, as the Judge Advocate General, I serve as the legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law; and I am responsible for the superintendence of the administration of military justice in the Canadian Armed Forces.

Shortly after my appointment as the Judge Advocate General on 27 June 2017, I issued strategic direction to the Office of the Judge Advocate General (Office of the JAG), articulating our institutional priorities, orienting all members of the Office of the JAG to a unified set of goals, and ensuring that in achieving those goals, the dedicated professionals of the Office of the JAG could refer to a shared set of principles to guide and shape their actions. The 2018-2021 Office of the JAG Strategic Direction "Excellence Through Service" provides our overarching mission statement:

To deliver client-focused, timely, optionsoriented and operationally-driven military legal services in support of Government of Canada, Department of National Defence and Canadian Armed Forces priorities and objectives; and, to superintend the administration of military justice in the Canadian Armed Forces while respecting the independent roles of each statutory actor within the military justice system.

In the increasingly multifaceted, fast paced, and resource limited environment within which we currently operate, our steadfast commitment to this overarching mission

1 2018-2021 Office of the JAG Strategic Direction – "Excellence Through Service", accessible online at: https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/jag/ojag-strategic-direction-2018-2021-en.pdf.

statement enables the Office of the JAG to remain responsive to our clients' needs and deliver the essential legal support that our clients rely upon, while adapting to an increasingly challenging and complex operational environment, both domestically and abroad. This has been especially important during the Canadian Armed Forces' response to the COVID-19 pandemic under Operation LASER, during which the Office of the JAG has been required to remain responsive and flexible in providing legal services under challenging, fast-paced, and evolving circumstances.

A "New Era" for Military Justice in Canada

At the close of the last reporting period, the military justice system stood at an important juncture and at the precipice of significant change. In the wake of external reviews recommending sweeping changes to the military justice system, with Parliament moving forward on significant legislative amendments to the *National Defence Act*, and the Supreme Court of Canada deliberating on important constitutional questions pertaining to the military justice system, change was inevitable. The continued responsible evolution of the military justice system is important, necessary, and positive. As with the civilian criminal justice system, the military justice system constantly evolves through jurisprudence, legislative amendments, policy

The "new era"
for military justice in
Canada is characterized
by increased efficiency,
fairness, effectiveness,
and unambiguous
constitutional
legitimacy.

developments, as well as regular internal and external reviews. These developments contribute to the evolution and enhancement of the military justice system, and enable it to meet the needs of those involved, as well as incorporating Canadian legal requirements and societal norms.

This reporting period marked the realization of a series of significant jurisprudential, legislative, and policy developments, all of which have helped define a "new era" for military justice in Canada. I am confident that the military justice system will continue to operate in accordance with the rule of law, evolve and remain responsive to developments in law and society, and remain a critically important and relevant system for promoting discipline, efficiency, and morale within the Canadian Armed Forces. In my role as the superintendent of the administration of military justice, I am resolute in my commitment to ensure the responsible evolution of the Canadian military justice system while maintaining responsiveness to the unique requirements of the Canadian Armed Forces.

R v Stillman – Securing the Constitutional Legitimacy of the Military Justice System

During this reporting period, the Supreme Court of Canada rendered its landmark decision in *R v Stillman*,² which represented a watershed moment for military legal practitioners across Canada and a defining moment for the Canadian military justice system. The majority of the Supreme Court unambiguously affirmed the need for a separate system of military justice in Canada and confirmed that the system is constitutional, valid, and necessary. Drawing upon the Supreme Court's prior rulings in *R v Généreux*³ and *R v Moriarity*,⁴ the Court reaffirmed that the purpose of the military justice system is to "assure the maintenance of discipline, efficiency and morale of the military."⁵

In its decision, a majority of the Supreme Court recognized that the military justice system functions as a full partner with the civilian criminal justice system, having "evolved from a command-centric disciplinary model ... to a parallel system of justice that largely mirrors the civilian criminal justice system."

In discussing the continued evolution of the military justice system, the Supreme Court went on to note that "the continuing evolution of this system is facilitated by the periodic independent reviews ... ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals.

This speaks to the dynamic nature of the military justice system. Just as the civilian criminal justice system grows and evolves in response to developments in law and society, so too does the military justice system."

² R v Stillman, 2019 SCC 40 [Stillman].

³ R v Généreux, [1992] 1 S.C.R. 259.

⁴ R v Moriarity, 2015 SCC 55.

⁵ Stillman, supra note 2 at paragraph 35.

⁶ *Ibid* at paragraph 53.

⁷ Ibid.

R v Stillman confirms the constitutional legitimacy of the military justice system and represents a clear recognition of the hard work done over many years to create a sound system of military justice. I recognize that this validation comes with great responsibility. As the Supreme Court clearly signaled, the Executive and Legislative branches of government are expected to ensure that the military justice system continues to grow and evolve alongside the broader legal community and society at large. As such, my team of dedicated professionals in the Office of the JAG and I will continue our efforts to ensure that the military justice system consistently meets these legitimate expectations.

Enhancing the Military Justice System through Legislative Developments

On the heels of the final implementation of legislative reform brought forth during the last reporting period by Bill C-15, the Strengthening Military Justice in the Defence of Canada Act, the Office of the JAG continued to press forward during this reporting period in its effort to further enhance and strengthen the military justice system by providing dedicated support to Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts (Bill C-77). I am very pleased to report that Bill C-77 received Royal Assent during this reporting period, on 21 June 2019.

The reform to the National Defence Act brought forth by Bill C-77 represents the most significant legislative update to the National Defence Act since 1999 and serves as a further catalyst for this "new era" of military justice. The reform resulting from the enactment of Bill C-77 represents the Government of Canada's commitment to strengthening victims' rights within the military justice system and enhancing the fairness of the system. To this end, Bill C-77 introduces the Declaration of Victims Rights to the Code of Service Discipline, which enshrines a number of rights for victims of service offences within the military justice system, such as the right to information, protection, participation, and restitution. These rights largely mirror those found in the Canadian Victims Bill of Rights, and their introduction aligns the victims' rights framework in the military justice system with that of the civilian criminal justice system. Amongst other significant amendments to the National Defence Act, Bill C-77 includes provisions requiring the consideration of the unique circumstances of indigenous offenders during sentencing, mirroring similar provisions found in the Criminal Code. Bill C-77 also simplifies and enhances military discipline at the unit level by reforming the summary trial process into a non-penal, non-criminal summary hearing process designed to address minor breaches of discipline more efficiently and effectively.

While certain provisions of Bill C-77 came into force upon Royal Assent, the full implementation of the provisions of Bill C-77 calls for significant regulatory changes requiring several years of policy development, consultations with internal and external partners and stakeholders, as well as working closely with regulatory drafters from the Department of Justice. The Office of the JAG is prepared to fully support these efforts and has commenced the necessary consultations during this reporting period. The Office of the JAG will continue its efforts to enhance the military justice system by fully implementing the provisions of Bill C-77 over the coming years.

Policy Initiatives – Implementing the Recommendations of the Office of the Auditor General of Canada and the House of Commons Standing Committee on Public Accounts Reports on the Administration of Justice in the Canadian Armed Forces

As noted in my last Annual Report, on 29 May 2018 the Office of the Auditor General tabled its report on the Administration of Justice in the Canadian Armed Forces. The report concluded that the Canadian Armed Forces could improve efficiency in the administration of the military justice system and that the Office of the JAG could improve effective oversight of the system. This report was later studied by the House of Commons Standing Committee on Public Accounts, which released its own report on 6 December 2018. Each of these reports contained nine recommendations, which were ultimately designed to enhance the efficiency and effective oversight of the military justice system.

In response to the reports, the Department of National Defence and the Canadian Armed Forces acknowledged the findings and accepted all of the recommendations. At the conclusion of the last reporting period, the Office of the JAG had fully implemented four of the nine recommendations of each report. I am proud to report that during this reporting period, the Office of the JAG has made progress towards the full implementation of the remaining recommendations through the launch of numerous initiatives. These initiatives include the Justice Administration and Information Management System (JAIMS), the Military Justice System Performance

Monitoring Framework, Military Justice Time Standards, and the Military Justice Stakeholder Engagement Project. These initiatives—both individually and collectively—serve to modernize the military justice system, enhancing efficiency, effectiveness, and oversight and serving as yet another hallmark of the "new era" in military justice.

On 27 September 2019, the Canadian Armed Forces launched JAIMS, an innovative case management system that enables the Canadian Armed Forces to leverage technology, data, and analytics to improve and enhance the military justice system. JAIMS is a web-based case management system that electronically tracks discipline files from the time a complaint is received to the time a file is closed, including the carrying-out of the sentence. JAIMS will serve to improve the speed and efficiency through which military justice cases are processed, thereby bolstering the efficiency and overall legitimacy of the military justice system. JAIMS was rolled out to select units in Petawawa during this reporting period. While JAIMS can currently support many routine cases, further testing and development continue to ensure that all system requirements are functional and delivered, and that all types of military justice cases can progress through JAIMS. Although the Canadian Armed Forces' response to the COVID-19 pandemic under Operation LASER has temporarily delayed the development and rollout of JAIMS, work on JAIMS will continue in the coming reporting periods, with the system being rolled out gradually, methodically, and responsibly across the Canadian Armed Forces.

During this reporting period, the Office of the JAG has made progress towards the full implementation of all of the recommendations from the reports of the Office of the Auditor General of Canada and the House of Commons Standing Committee on Public Accounts.

Furthermore, in order to improve upon the Office of the JAG's capability for evidence-based decision making and to better track the progress of military justice files while minimizing delays, the Office of the JAG has concurrently launched two additional initiatives which will be fully integrated into JAIMS - the Military Justice System Performance Monitoring Framework and Military Justice Time Standards. During this reporting period, the Office of the JAG completed and approved the metrics for the Military Justice System Performance Monitoring Framework. This system will deliver measureable data on the performance of the military justice system, that identifies emerging challenges (including delays) while informing measures to address them. Additionally, Military Justice Time Standards were also developed for every phase of the military justice process during this reporting period. These time standards ensure that actors throughout every stage of the military justice system are aware of, and aim to comply with, efficiencydriven time standards. In addition to integrating them into JAIMS, the Military Justice Time Standards have also been communicated to all Canadian Armed Forces members by way of a Canadian Forces General Message (CANFORGEN).

Finally, as part of the Office of the JAG's ongoing effort to regularly monitor the military justice system, the Military Justice Stakeholder Engagement Project was launched during this reporting period. The Military Justice Stakeholder Engagement Project consists of an online survey designed to collect measurable qualitative data from a variety of actors involved in the summary trial process, including charge layers, accused persons, and assisting officers among others. During the reporting period, the Military Justice Stakeholder Engagement Project collected its first round of data and findings were presented in the "2018-2019 - Summary Trial Stakeholder Survey Results." The data from the Military Justice Stakeholder Engagement Project has been, and will continue to be, leveraged by the Office of the JAG in the ongoing effort to support sound, data-driven policy decision-making concerning the superintendence of the military justice system.8

⁸ See Annex E for the 2018-2019 Summary Trial Stakeholder Survey Results.

Conclusion

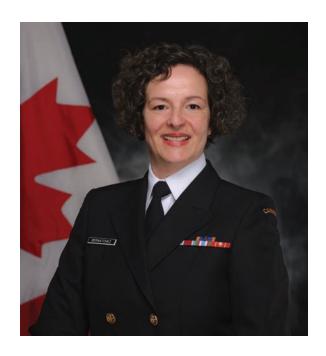
As we move into a new decade, we face an increasingly complex and challenging operational environment. Nothing better demonstrates these growing complexities than our ongoing fight to contain the COVID-19 pandemic. The Office of the JAG, along with members of the Defence Team as well as Canadians from all walks of life, have been forced to adapt and respond to our collective civic duty to protect ourselves and each other by following the instructions of federal, provincial, local, and Canadian Armed Forces authorities. In these challenging times, I am filled with admiration for the dedication and enduring professionalism demonstrated by the military and civilian professionals of the Office of the JAG, who, in spite of the challenges, remain committed to the success of our mission and to delivering "Excellence Through Service" in support of the Government of Canada, the Department of National Defence, and the Canadian Armed Forces.

I am especially thankful to the exceptional leaders that make up the Senior Council team of the Office of the JAG for their exemplary dedication, energy, and guidance, particularly as we navigate our way through these unprecedented and extremely demanding circumstances. They are a formidable team and their individual and collective insights are invaluable.

Despite the challenges, we move into this new decade with purpose and readiness to respond to our clients' needs while positioning ourselves for ongoing success. This is indeed a very meaningful time to serve as the superintendent of the administration of military justice in the Canadian Armed Forces. The collective accomplishments of the Office of the JAG during this reporting period have been plenty, and have directly contributed to the successful attainment of our mission. These accomplishments have helped define a "new era" for military justice, which is characterized by increased efficiency, fairness, effectiveness, and constitutional legitimacy. I am confident that this has increased confidence in the Canadian military justice system as well as enhanced its capability to support the operations of the Canadian Armed Forces both at home and abroad. The military justice system continues to serve an integral role in maintaining the discipline, efficiency, and morale of the Canadian Armed Forces while respecting the rule of law and meeting the expectations of Canadians.

Fiat Justitia

Geneviève Bernatchez, OMM, CD Rear-Admiral





WHO WE ARE: THE OFFICE OF THE JUDGE ADVOCATE GENERAL

THE JUDGE ADVOCATE GENERAL

In accordance with sections 9 and 9.1 of the *National Defence Act*, the Judge Advocate General is appointed by the Governor in Council for a renewable term of four years and acts as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law. The Judge Advocate General also has the statutory mandate to superintend the administration of military justice in the Canadian Armed Forces pursuant to section 9.2 of the *National Defence Act*. The Judge Advocate General is responsible to the Minister of National Defence in the performance of her duties and functions.

The Judge Advocate General has command over all officers and non-commissioned members posted to a position within the Office of the JAG. To ensure the provision of independent legal services, legal officers within the Office of the JAG are not subject to the command of an officer who is not a legal officer, in respect of the performance of those duties.

The Judge Advocate General acts as a legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law.

COMMAND OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the Judge Advocate General (Office of the JAG). The duties of a legal officer posted to a position established within the Office of the JAG are determined by, or under the authority of, the Judge Advocate General and, in respect of the performance of those duties, a legal officer is not subject to the command of an officer who is not a legal officer. This is to ensure legal officers provide independent legal services. All qualified legal officers serving in the Office of the JAG are members in good standing at the bar of a province or territory.

¹ See para 4.081(4) of the Queen's Regulations and Orders for the Canadian Forces.

OFFICE OF THE JUDGE ADVOCATE GENERAL

The Office of the JAG supports the Judge Advocate General in carrying out her statutory duties and functions. It is composed of Canadian Armed Forces' Regular and Reserve Force legal officers, civilian members of the Public Service, and Canadian Armed Forces' members from other military occupations.

The Office of the JAG is composed of the independent Canadian Military Prosecution Service and Directorate of Defence Counsel Services, the Deputy Judge Advocate General Strategic, along with the following Divisions: Military Justice, Administrative Law, Operational and International Law, Regional Services, and Corporate Services. The Office of the JAG has regional offices located across Canada and internationally. Figure 1-1 shows a map of all the different Canadian offices of the Office of the JAG.

Canadian Military Prosecution Service

Defence Counsel Services

Deputy Judge Advocate General – Strategic

Military Justice Division

Administrative Law Division

Operational and International Law Division

Regional Services Division

Corporate Services Division



FIGURE 1-1: CANADIAN OFFICES OF THE JUDGE ADVOCATE GENERAL



THE JUDGE ADVOCATE GENERAL CHIEF WARRANT OFFICER

The Judge Advocate General Chief Warrant Officer serves as the senior non-commissioned member adviser to the Judge Advocate General. Based on the command team concept, the Judge Advocate General Chief Warrant Officer provides perspective to the Judge Advocate General and her senior leadership team on strategic issues related to the Judge Advocate General's statutory roles, the Canadian Armed Forces, and the Office of the JAG.

Together with the Canadian Armed Forces Chief Warrant Officer, the Judge Advocate General Chief Warrant Officer co-chairs the Canadian Armed Forces Discipline Advisory Council. This council includes the most senior non-commissioned members from each command, and from other key Level One organizations. The council meets to discuss strategic issues relevant to the maintenance of discipline, and provides input to both the Armed Forces Council and the Judge Advocate General.

Other experienced Chief Warrant Officers and Chief Petty Officers First Class are posted to positions in the Assistant Judge Advocate General offices within Canada. These members provide an invaluable link between senior non-commissioned members at the unit, base, and formation level, and the local legal office in addressing disciplinary and administrative matters.

During the current reporting period, the Judge Advocate General Chief Warrant Officer has:

- Co-chaired the Canadian Armed Forces Discipline Advisory Council
- Coordinated and maintained responsibility for all ceremonial functions in the National Capital Region
- Formalized and delivered training for unit disciplinary investigations and charge laying
- Contributed to the creation of an Assistant Judge Advocate General / Deputy Judge Advocate General Chief Warrant Officer position in Petawawa
- Coordinated with all Level One Chief Warrant Officers on key files and issues
- Managed projects to mount an honours and recognition board as well as a historical board, identifying all former Judge Advocate Generals and Judge Advocate General Chief Warrant Officers, at the Judge Advocate General Headquarters

DIRECTOR OF MILITARY PROSECUTIONS

The Director of Military Prosecutions, the senior military prosecutor in the Canadian Armed Forces, is appointed by the Minister of National Defence for a renewable term of four years pursuant to subsections 165.1(1) and (2) of the *National Defence Act*. The Director of Military Prosecutions acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising his prosecutorial powers, duties, and functions. Only the Minister of National Defence may remove the Director of Military Prosecutions from office for cause, and only on the recommendation of an inquiry committee.

In accordance with section 165.15 of the National Defence Act, the Director of Military Prosecutions may be assisted and represented, to the extent determined by the Director of Military Prosecutions, by officers who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Military Prosecutions is assisted by a number of Regular and Reserve Force legal officers appointed to represent the Director of Military Prosecutions, along with a civilian paralegal and support staff. In instances where there is a risk of conflict of interest, the Director of Military Prosecutions may also appoint special prosecutors who are not legal officers but who are Canadian Armed Forces officers and barristers or advocates with standing at the bar of a province or territory. The Office of the Director of Military Prosecutions, known as the Canadian Military Prosecution Service, is organized regionally with Regional Military Prosecutors located in Halifax, Valcartier, Ottawa, Edmonton, and Esquimalt.

It is the responsibility of the Director of Military Prosecutions, with the assistance of those legal officers appointed to act as military prosecutors, to prefer all charges to be tried by court martial, to conduct all prosecutions at court martial, and to act as counsel for the Minister of National Defence in respect of appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada. The Director of Military Prosecutions is also responsible to provide advice in support of investigations conducted by the Canadian Forces National Investigation Service, a military police service that reports to the Canadian Forces Provost Marshal. The Director of Military Prosecutions also

acts as counsel for the Canadian Armed Forces during custody review hearings.

Pursuant to the *National Defence Act*, the Director of Military Prosecutions is under the general supervision of the Judge Advocate General and, in this regard, the Judge Advocate General may issue general instructions or guidelines in writing in respect of prosecutions, which the Director of Military Prosecutions must ensure are made available to the public. The Judge Advocate General may also issue instructions or guidelines in

This year marked an important milestone for the Canadian Military Prosecution Service, with the release of the Supreme Court of Canada decision in *R v Stillman*, which re-affirmed the legitimacy and importance of a military justice system capable of responding to a full range of service offences in order to maintain the discipline, efficiency, and morale of the Canadian Armed Forces.

Additionally, during this reporting period, the Director of Military Prosecutions has:

- Continued to engage in strategic outreach with members of the Canadian Armed Forces as well as with civilian and military prosecutors both nationally and internationally through the Federal/Provincial/Territorial Heads of Prosecution Committee and the International Association of Prosecutors
- Supported Regional Military
 Prosecutors to continue to train
 and engage with their civilian
 counterparts across the country

writing in respect of a particular prosecution. The Director of Military Prosecutions must ensure that these instructions or guidelines are also available to the public, unless the Director of Military Prosecutions considers that doing so would not be in the best interest of the administration of military justice. The Judge Advocate General did not issue any general or specific instructions or guidelines to the Director of Military Prosecutions during this reporting period.

Following recommendations made by the Office of the Auditor General of Canada and in order to assist the Director of Military Prosecutions in developing a highly capable team of experienced prosecutors, the Judge Advocate General issued directions, during the previous reporting period, to ensure that all legal officers assigned to assist the Director of Military Prosecutions will remain in their positions for a minimum of five years, subject to the requirements of the Director.

In accordance with article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Military Prosecutions reports annually to the Judge Advocate General on the execution of his duties and functions. A comprehensive review of the Canadian Military Prosecution Service activities over this reporting period can be found in the Director of Military Prosecutions Annual Report 2019-2020, attached as Annex C to this report.

DIRECTOR OF DEFENCE COUNSEL SERVICES

The Director of Defence Counsel Services is appointed by the Minister of National Defence for a renewable term of four years pursuant to subsections 249.18(1) and (2) of the *National Defence Act*. The Director of Defence Counsel Services acts independently from the Canadian Armed Forces and Department of National Defence authorities when exercising his powers, duties and functions. Only the Minister of National Defence may remove the Director of Defence Counsel Services from office for cause, and only on the recommendation of an inquiry committee.

In accordance with section 249.21 of the *National Defence Act*, the Director of Defence Counsel Services may be assisted in his duties and functions by persons who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Defence Counsel Services, located in the National Capital Region, is assisted by a number of Regular and Reserve Force legal officers who act as defence counsel, along with a civilian paralegal and support staff.

In accordance with section 249.19 of the *National Defence Act*, it is the responsibility of the Director of Defence Counsel Services to provide, supervise and direct the legal services available, at no cost, under article 101.11 of the *Queen's Regulations and Orders for the Canadian Forces* to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline. This includes:

- the provision of legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry;
- the provision of legal advice to persons arrested or detained in respect of a service offence;
- the provision of legal counsel to an accused person where there are reasonable grounds to believe that the accused person is unfit to stand trial;
- the provision of legal advice of a general nature to an accused person or assisting officer on matters relating to summary trials;

- the provision of legal counsel to a person in respect of an application to review a direction for the conditional release of the person from custody following arrest;
- the provision of legal counsel to a person in respect of pre-trial custody hearings, in situations where the accused person is retained in custody following arrest;
- the provision of legal advice to an accused person with respect to the making of an election to be tried by court martial;
- the provision of legal advice to an accused person with respect to the waiver of the limitation periods;
- the provision of legal counsel to an accused person in respect of whom an application to a referral authority has been made;
- the provision of legal advice to an offender, or to an
 officer or non-commissioned member appointed
 to assist an offender, in respect of an application to
 vary a suspension order or an intermittent sentence
 order or an application to vary conditions or in
 respect of a hearing into breach of conditions;
- the provision of legal advice to a person who wishes to preserve the right to appeal under the National Defence Act;
- the provision of legal advice to a person who wishes to apply, or has applied, to the Appeal Committee;
- the provision of legal counsel to a person in respect of an application for release pending an appeal;
- the provision of legal counsel to a person released from custody pending appeal, in respect of an application for review or breach of an undertaking or appeal;
- the provision of legal counsel to the respondent on an appeal or an application for leave to appeal by the Minister of National Defence; and
- the provision of legal counsel to an appellant on an appeal or an application for leave to appeal with the approval of the Appeal Committee.

This year, Defence Counsel Services capably advocated before the Supreme Court of Canada and assisted the Court in bringing to a close long-standing litigation in the case of R v Stillman. This litigation, advanced in the interests of Defence Counsel Services' clients, addressed the scope and purpose of the military justice system, and provided the Supreme Court of Canada with the opportunity to consider important constitutional questions and render a ruling which establishes a solid legal foundation for the system of military justice we have today.

Additionally, during the current reporting period Defence Counsel Services has continued to provide legal advice and representation to members of the military community who were investigated for, or charged with, an offence under the military justice system.

The relationship between the Director of Defence Counsel Services and the Judge Advocate General is set out at section 249.2 of the National Defence Act. The Director of Defence Counsel Services acts under the general supervision of the Judge Advocate General but this general supervision must be exercised through general instructions or guidelines in writing in respect of defence counsel services. Furthermore, the Director of Defence Counsel Services must ensure that any such instructions or guidelines are available to the public. Unlike with the Director of Military Prosecutions, the Judge Advocate General has no authority to issue instructions or guidelines in respect of a particular case. The Judge Advocate General did not issue any general instructions or guidelines to the Director of Defence Counsel Services in respect of defence counsel services, during this reporting period.

In response to the recommendations of the Office of the Auditor General and to assist the Director of Defence Counsel Services in the development of litigation expertise within the Defence Counsel Services team, the Judge Advocate General issued directions, during the last reporting period, to ensure that all legal officers assigned to assist the Director of Defence Counsel Services will remain in their positions for a minimum of five years, subject to the requirements of the Director.

In accordance with paragraph 101.11(4) of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Defence Counsel Services is required to report annually to the Judge Advocate General on the provision of legal services as well as other duties that are prescribed by regulations. A copy of the Annual Report 2019-2020 Director of Defence Counsel Services is attached as Annex D to this report.

DEPUTY JUDGE ADVOCATE GENERAL STRATEGIC

The Judge Advocate General authorized the position of Deputy Judge Advocate General Strategic to develop and facilitate strategic initiatives to ensure that the provision of statutorily mandated legal services fully integrates, aligns with and supports the Government of Canada, Departmental and Canadian Armed Forces objectives and priorities promulgated in Canada's Defence Policy-Strong, Secure, Engaged; the Defence Plan (2018-2023); the Defence Results Framework initiative; as well as the Force Posture and Readiness and Defence Program Analytics directives. The mandate of the Deputy Judge Advocate General Strategic during the reporting period included the renewal of a performance measurement system and support to the development and implementation of personnel management and professional practice policies and directives.

During the current reporting period, the Deputy Judge Advocate General Strategic has:

- Continued to focus on the development and testing of an in-house performance measurement system (the Legal Resource Management Tool)
- Collaborated with the other Divisions of the Office of the JAG to develop alternate performance measurement strategies to effectively evaluate the Office of the JAG within the National Defence Department Results Framework
- Established the framework to enable the Deputy Judge Advocate General Strategic to participate in a key interdepartmental initiative with a secondment to the Department of Justice at the senior management level, over the forthcoming reporting period

MILITARY JUSTICE DIVISION

The Military Justice Division assists the Judge Advocate General in superintending the administration of military justice and ensuring its responsible development within the Canadian justice system. It is comprised of four directorates: Military Justice Strategic, Military Justice Policy, Military Justice Operations, and Canadian Forces Provost Marshal Legal Services.

The Directorate of Law/Military Justice Strategic supports the Judge Advocate General in the development of her strategic vision for military justice. This enables the Office of the JAG and the Canadian Armed Forces to anticipate and respond to external and internal challenges, while supporting the responsible development of the military justice system. The other directorates support the Judge Advocate General in the implementation of her vision for military justice in three convergent ways. The Directorate of Law/Military Justice Policy plays a key role in the development of legislation and regulation related to the military justice system. These initiatives arise from projects seeking amendments to the National Defence Act as well as from legislative proposals led by other government departments. The Directorate of Law/ Military Justice Operations is responsible to provide direct, operational support to the Judge Advocate General as the superintendent of the administration of military justice in the Canadian Armed Forces. This includes providing support on military justice issues to all legal officers within the Office of the JAG, formulating policy on military justice issues and providing the necessary support for the appointment of individuals to the various military justice committees. This Directorate is also responsible for the production of the Judge Advocate General's Annual Report to the Minister of National Defence and is responsible for the Superintendence Enhancement and Assessment Project. Finally, the Directorate of Canadian Forces Provost Marshal Legal Services is responsible to provide legal advice and services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group. This Directorate enables the efficient and effective lawful conduct of policing operations, investigations, custody, and mandated security tasks. In addition, it also acts as a principal liaison between the Office of the JAG and the Canadian Forces Provost Marshal.

During the current reporting period, the Military Justice Division has:

- Supported Bill C-77: An Act to amend the National Defence Act and to make related and consequential amendments to other Acts, as it progressed through the parliamentary process and received Royal Assent
- Led the effort to implement the recommendations stemming from Office of the Auditor General of Canada and parliamentary reviews pertaining to the administration of justice in the Canadian Armed Forces
- Coordinated the development of key initiatives designed to improve the military justice system, including the Justice Administration and Information Management System, the Military Justice Performance Monitoring Framework, the Military Justice Stakeholder Engagement Project, and Military Justice Time Standards
- Facilitated the roll-out of the Justice Administration and Information Management System to units across the Canadian Armed Forces, in conjunction with experts from the Assistant Deputy Minister (Information Management)
- Defined and implemented time standards pertaining to every aspect of the military justice system in cooperation with the chain of command and other stakeholders
- Facilitated engagement of key military justice stakeholders on challenges facing the military justice system through the Military Justice Stakeholders' Forum
- Commenced planning for the forthcoming Third Independent Review of the National Defence Act
- Provided valued legal services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group
- Fully supported the military justice system and ensured it remains operational and responsive to the needs of the Canadian Armed Forces during the COVID-19 pandemic
- Ensured that the military justice system remains in lockstep with the civilian criminal justice system and functions as a full partner in the administration of justice in Canada

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal advice to Canadian Armed Forces' leaders at the strategic level on matters pertaining to the administration of the Canadian Armed Forces. This includes military personnel policies, administrative investigations, compensation, benefits, pensions and estates, as well as advising on matters relating to the governance, organization, and command structure of the Canadian Armed Forces and the operation of the military grievance system. Given the size and complexity of the Canadian Armed Forces and the multitude of important administrative decisions made each day, one of the objectives of providing legal advice in the military administrative law realm is to ensure that these decisions are made in accordance with the applicable legislation, the rule of law, and procedural fairness requirements.

The Administrative Law Division is composed of three directorates: Military Personnel; Administrative Law; and Compensation, Benefits, Pensions and Estates. The Military Personnel directorate provides legal advice on the development and application of personnel policies spanning recruitment to release, including such topics as universality of service, human rights, remedial measures, and terms of service. The Administrative Law directorate provides legal advice and support in relation to complaint and conflict management, including grievances, grievance-related administrative investigations, and the Canadian Armed Forces organization and command structure. The Compensation, Benefits, Pensions and Estates directorate provides legal advice and support on the full spectrum of financial and compensation policies and instructions that support the military human resources management framework, as well as legal and administrative support in relation to Service Estates and Elections. Additionally, the Administrative Law Division is responsible for the legal adviser assigned to provide legal support to the Office of the Chief of the Defence Staff.

During this reporting period, the Administrative Law Division has supported:

- Canadian Armed Forces' response to the COVID-19 pandemic
- The implementation of Canada's Defence Policy – Strong, Secure, Engaged
- Other departmental and Canadian Armed Forces priorities, including diversity and inclusion, gender expression and gender identity, policy development for the elimination of hateful conduct, as well as the modernisation of the Universality of Service policy
- Government litigation, in collaboration with the Department of National Defence/ Canadian Forces Legal Adviser's office
- The development, delivery, and management of compensation and benefits for the Canadian Armed Forces
- The application of the grievance system, and the conduct of boards of inquiry

OPERATIONAL AND INTERNATIONAL LAW DIVISION

The Operational and International Law Division is responsible for the provision of support for all domestic and international operations. Additionally, this Division oversees all legal officers deployed on operations. These legal officers provide legal support to deployed Canadian Armed Forces elements in all aspects of military law, including the military justice system.

The Operational and International Law Division is comprised of six directorates: Strategic Operational Law, Directorate of Law - International, the Canadian Joint Operations Command Legal Adviser, the Canadian Special Operations Forces Command Legal Adviser, the Legal Adviser to the Canadian Commander at the North American Aerospace Defense Command and the Directorate of Law, Intelligence and Information Operations. In addition, during this reporting period 13 legal officers were deployed in direct support of five overseas operations: Operation IMPACT, Operation REASSURANCE, Operation PRESENCE, Operation ARTEMIS, as well as to the NATO Mission in Iraq. Deployed legal officers play a fundamental role in the establishment of the legal foundation for operations, and in providing close support to task force commanders and staff to help ensure that missions are conducted in accordance with applicable law.

The Strategic Operational Law Legal Adviser provides legal advice on all strategic level operational issues affecting Canadian Armed Forces operations around the world such as domestic and international legal authorities, rules of engagement, and use of force. The Directorate of Law - International provides strategic legal support and advice on the international legal framework for Canadian Armed Forces activities. This includes advice on international legal basis for the conduct of operations, prospective legal instruments as well as areas such as the law of armed conflict, international human rights law, and international criminal law. This Directorate is a principal liaison with the Privy Council Office Legal Operations, the Department of Justice, and Global Affairs Canada Legal Services. This Directorate also works closely with partners and allies as well as Non-Governmental Organizations like the Canadian Red Cross and the International Committee of the

During the current reporting period, the Operational and International Law Division has:

- Provided legal advice and support to over 20 Canadian Armed Forces operations around the world
- Deployed 13 legal officers in direct support of five overseas operations
- Provided support to a wide variety of domestic operations and activities
- Provided support to the North American Aerospace Defence Command
- Actively engaged in maintaining and developing strategic relationships with external partners like Global Affairs Canada, the Privy Council Office, the Canadian Red Cross, as well as allied military foreign services legal colleagues, academic institutions, and international organizations

Red Cross. The Canadian Joint Operations Command Legal Adviser provides legal advice to the Commander of the Canadian Joint Operations Command on all legal matters related to the conduct of conventional military operations at the operational level, in both continental and expeditionary contexts. In addition, deployed legal officers report to the Canadian Joint Operations Command Legal Adviser. The Canadian Special Operations Forces Command Legal Adviser provides legal advice in all aspects of military law related to the conduct of Canadian Special Operations Forces Command operations including its counter-terrorism

response domestically and internationally, its mandated response to all domestic and international terrorist attacks, as well as international crises and associated threats. The Legal Adviser to the Canadian Commander at the North American Aerospace Defence Command provides legal advice on national issues to the Deputy Commander of North American Aerospace Defence in his role as the senior Canadian officer in the binational command structure as well as advice on North American Aerospace Defence issues generally as part of the overall legal adviser team for the North American Aerospace Defence Command. The Directorate of Law, Intelligence and Information Operations is the primary legal adviser to the Canadian Forces Intelligence Command / Chief of Defence Intelligence and the National Security and Intelligence Review and Oversight Coordination Secretariat. It provides legal advice on strategic, operational and tactical level issues relating to both domestic and international matters of an intelligence nature including information sharing, open source intelligence, counter-intelligence investigations, and the development of cyber capabilities.



REGIONAL SERVICES DIVISION

The Regional Services Division, the largest of the Divisions within the Office of the JAG, delivers legal services principally to Canadian Armed Forces' commanders in Canada and Europe. It has legal offices located across and within various regions, and each region is led by an Assistant Judge Advocate General. There are 8 Assistant Judge Advocate General offices: Ottawa, Halifax, Montreal, Toronto, Winnipeg, Edmonton, Esquimalt, and Geilenkirchen (Germany). In addition, there are a number of Deputy Judge Advocate offices located across Canada which report directly to their respective regional Assistant Judge Advocate General.

Regular and Reserve Force legal officers in the Regional Services Division provide legal advice to Regular and Reserve Force commands, formations, and units on many aspects of military justice. This includes advice to the chain of command at the pre-charge and pre-trial phases, to referral authorities when charges are referred to the Director of Military Prosecutions, to presiding officers during the course of a summary trial, and to review authorities where there is a request for review by an accused or a review has been independently initiated by a review authority.

Legal officers in the Regional Services Division also provide a variety of training to the various Canadian Armed Forces units and other elements they advise, including on topics such as Unit Disciplinary Investigations, the Law of Armed Conflict, use of force, and administrative legal issues. In support of the Judge Advocate General's role as superintendent of the administration of military justice, legal officers in the Regional Services Division have conducted 86 two-day Presiding Officer Certification Training sessions during this reporting period, 10 of which were delivered in French, with approximately 1117 candidates completing the course.

Legal officers in the Regional Services Division also provide legal advice to commanders on administrative law and operational law matters and support Canadian Armed Forces international and domestic operations.

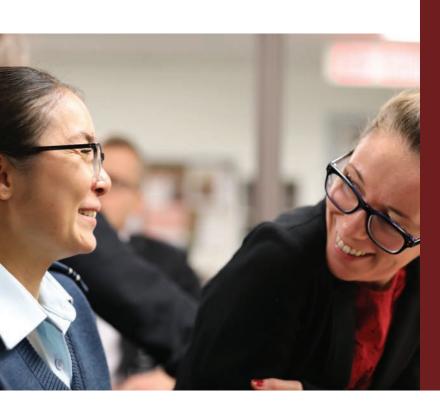
Finally, the Regional Services Division is the principal source for generating legal officers for Canadian Armed Forces exercises, training, and operational deployments in Canada and abroad.

During this reporting period, legal officers from the Regional Services Division have:

- Advised on all aspects of military justice at the tactical level, including during investigations, at the pre-charge and pretrial, trial, and administration phases; with an emphasis on providing practical, operationally focussed advice allowing the military justice system to function effectively, and in a fair and just manner
- Responded to high demands in all areas of military law, supporting over 1000 discipline cases, approximately 50 Boards of Inquiry, and many other issues including the provision of advice on strategic policies, grievances, and removals from command
- Provided legal advice on the application of the North Atlantic Treaty Organization Status of Forces Agreement and other related agreements
- Provided legal support to domestic operations such as Operation LENTUS (floods and fires), Operation GLOBE (repatriation and quarantine of Canadians affected by the COVID-19 pandemic), Operation LASER (response to the COVID-19 pandemic), Search and Rescue, support to northern communities, and Assistance to Law Enforcement Agencies
- Supported force generation by participating in a variety of exercises including on the Canadian Army's Road to High readiness in Wainwright, exercises to test Five Eyes-Interoperability, Northern exercises, as well as Maritime and Air operation exercises
- Provided legal support in the planning for RIMPAC 2020
- Conducted 86 two-day Presiding Officer Certification Training sessions, 10 of which were delivered in French, with approximately 1117 candidates completing the course
- Worked with the International Committee of the Red Cross as well as the Canadian Red Cross subject matter experts in the field of International Humanitarian Law

CORPORATE SERVICES DIVISION

The Corporate Services Division is composed of civilian and military staff, who are responsible for providing corporate services and support across a range of areas. They include providing support services required for the proper functioning of the Office of the IAG, including business planning, comptroller and financial information management and technology, civilian human resources, military and civilian training, organization and establishment, and administrative support services. The Corporate Services Division's staff are also responsible for meeting external corporate requirements, and routinely represent the Office of the JAG at meetings and working groups of the larger Department of National Defence and Canadian Armed Forces community. The Corporate Services Division also provides support to the Legal Branch adviser, assisting in the recruiting and professional development of legal officers.



During the current reporting period, the Corporate Services Division has:

- Organized the Office of the JAG's 68th Continuing Legal Education Symposium
- Supported the development of the Office of the JAG's performance measurement system
- Contributed to the development of the Justice Administration and Information Management System through the identification and assignment of additional personnel and financial resources
- Reviewed and updated the Judge Advocate General Policy Directives (including drafting a new directive on Responding to Access to Information and Privacy Requests)
- Attaining preferred manning level through intensive recruiting efforts in the past reporting periods
- Launched the Legal Officer
 Military Employment Structure
 study
- Swiftly responded to the COVID-19 pandemic by activating the Business Continuity Plan for the Office of the JAG

DEPUTY JUDGE ADVOCATE/ RESERVES

The Deputy Judge Advocate General/Reserves is a member of the Office of the JAG Senior Council and provides critical advice to the Judge Advocate General and Office of the JAG senior leadership in matters of Primary Reserve policy and employment in relation to Reserve Force legal officers.

Reserve Force legal officers provide tactical legal support to Canadian Armed Forces reserve elements, offer unique legal skills, and provide a surge capacity to complete tasks which exceed the Office of the JAG regular force capacity. Primary Reserve List members are located throughout Canada and principally support the Regional Services Division, the Canadian Military Prosecutions Service, and the Directorate of Defence Counsel Services. Reserve Force legal officers undergo the same training and development as their Regular Force counterparts to ensure the readiness and capacity of the Office of the JAG to support the full range of Canadian Armed Forces operations. Primary Reserve List members in regional services maintain personal readiness and may voluntarily deploy on domestic and international operations.

LEGAL OFFICERS SERVING OUTSIDE THE OFFICE OF THE JUDGE ADVOCATE GENERAL

A number of legal officers serve outside the Office of the JAG, including those working at the Privy Council Office, Global Affairs Canada, the Canadian Forces Military Law Centre, and the Department of National Defence/Canadian Armed Forces Legal Adviser with the Department of Justice. During the next reporting period, these positions will be augmented by a new position for the Deputy Judge Advocate General Strategic to be seconded within senior leadership at the Department of Justice.

During the current reporting period, Primary Reserve List members have:

- Deployed in support of Operation REASSURANCE, the operation to support NATO assurance and deterrence measures in Central and Eastern Europe
- Worked on special assignments with the Military Justice Division and Canadian Forces Military Law Centre
- Supported the initiatives of the Office of the JAG as well as the full range of Canadian Armed Forces operations

CIVILIAN PERSONNEL OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Civilian personnel form an essential part of the Office of the JAG and greatly contribute to its continued success. They occupy positions located throughout Canadian Armed Forces bases and wings in Canada and abroad to provide key support to legal officers and non-legal military personnel through their work in administrative, analytical, and technical tasks.



THE CANADIAN MILITARY JUSTICE SYSTEM: STRUCTURE AND STATISTICS

CANADA'S MILITARY JUSTICE SYSTEM

Canada's military justice system is a separate and parallel system of justice that forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian criminal justice system and it is subject to the same constitutional framework, including the Canadian Charter of Rights and Freedoms. On more than one occasion, the Supreme Court of Canada has directly addressed the requirement for a separate, distinct military justice system to meet the specific needs of the Canadian Armed Forces;1 with the Court most recently recognizing that the military justice system is a "full partner in administering justice alongside the civilian justice system."2

The military justice system is designed to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency, and morale, while ensuring that justice is administered fairly and with respect to the rule of law. These objectives give rise to many of the substantive and procedural differences that properly distinguish the military justice system from the civilian justice system.

In R v Stillman (2019), a majority of the **Supreme Court of Canada** recognized that the military justice system is a "full partner in administering justice alongside the civilian justice system."

R v Généreux [1992] 1 SCR 259; Mackay v R [1980] 2 SCR 370 at 399; R v Moriarity [2015] 3 SCR 485.

R v Stillman, 2019 SCC 40 at paragraph 20.

THE STRUCTURE OF THE MILITARY JUSTICE SYSTEM

The Code of Service Discipline

The Code of Service Discipline, Part III of the *National Defence Act*, is the foundation of the military justice system. It sets out disciplinary jurisdiction and provides for service offences that are essential to the maintenance of discipline and the operational effectiveness of the Canadian Armed Forces. It also sets out the procedures and organization of service tribunals, the jurisdiction of various actors in the military justice system, powers of punishment, post-trial, review and appeal mechanisms.

The term "service offence" is defined in the National Defence Act as "an offence under this Act, the Criminal Code, or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline." Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command, absence without leave, and conduct to the prejudice of good order and discipline, in addition to more conventional offences such as those found in the Criminal Code and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are subject to the Code of Service Discipline everywhere and at all times, whereas members of the Reserve Force are subject to the Code of Service Discipline only in the circumstances specified in the National Defence Act.

The military justice system is designed to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency, and morale, while ensuring justice is administered fairly and with respect to the rule of law.

THE TWO TIERS OF THE MILITARY JUSTICE SYSTEM

The military justice system has a tiered structure comprised of two types of service tribunals: summary trials and courts martial. The Queen's Regulations and Orders for the Canadian Forces outline procedures for the disposal of a charge by each type of service tribunal. The following sections describe the two tiers of military justice system, as they currently stand. It should be noted, however, that Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts (Bill C-77), which received Royal Assent on 21 June 2019, reforms and strengthens both tiers of the military justice system in a number of ways. While some of the legislative and regulatory amendments applicable to both summary trials and courts martial have already come into force, the Office of the Judge Advocate General (Office of the JAG), in conjunction with regulatory drafters from the Department of Justice, are actively working on the numerous regulatory amendments required to bring the remaining provisions into force.

Summary Trials

The summary trial is the most common form of service tribunal. It allows for relatively minor service offences to be tried and disposed of quickly at the unit level. Summary trials are presided over by members of the chain of command, who are trained and certified by the Judge Advocate General as qualified to perform their duties as presiding officers in the administration of the Code of Service Discipline.³ All accused members are entitled to an assisting officer in the preparation of their case, during the summary trial⁴ and in the preparation of a post-trial review request.⁵

The procedures at summary trial are straightforward and the powers of punishment are limited. This limitation reflects both the relatively minor nature of the offences involved, and the intent that the punishments be primarily corrective in nature.

³ Queen's Regulations and Orders for the Canadian Forces article 101.07 [QR&O].

⁴ *Ibid* at article 108.14.

⁵ *Ibid* at paragraph 108.45(18).

After a charge is laid, if it is determined that the accused can be tried by summary trial then, except in certain circumstances, an accused person has a right to be offered an election to be tried by court martial.⁶ The election process was designed to provide the accused with the opportunity to make an informed choice regarding which type of service tribunal will try the matter.

The jurisdiction of a summary trial is limited by factors such as the rank of the accused and the type of offences. All service offences may be tried by court martial; however, those listed in paragraph 108.07(2) of the *Queen's Regulations and Orders for the Canadian Forces* may also be tried by summary trial. Service members at or above the rank of Colonel cannot be tried by summary trial.⁷

The disposition of charges by summary trial is meant to occur expeditiously. Unless the accused waives the limitation periods, an accused person may not be tried by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed and unless the summary trial commences within one year after that day.⁸

Review of a Finding Made and/or Sentence Imposed at Summary Trial

A member of the Canadian Armed Forces found guilty of a service offence at summary trial has the right to apply to a review authority for a review of the findings, the punishment imposed, or both. The findings made and/or punishments imposed at summary trial may also be reviewed on the independent initiative of a review authority. A review authority is a more senior officer in the chain of command of the officer who presided over the summary trial, as designated by the Queen's Regulations and Orders for the Canadian Forces. A review authority may quash any findings of guilt made at summary trial, substitute any finding of guilt or punishment, or may mitigate, commute, or remit any punishment awarded at summary trial. Before making any determination, a review authority must obtain legal advice.9

- Most common form of service tribunal
- Designed to quickly and efficiently try and dispose of minor service offences at the unit level
- Presided over by members of the chain of command
- Accused persons are entitled to an assisting officer throughout the process
- With the exception of certain circumstances, accused persons have the right to elect to be tried by court martial or summary trial
- A person found guilty at summary trial has the right to apply for a review of finding, the sentence imposed, or both

⁶ An accused does not have the right to elect his or her mode of trial in two instances. First in cases provided for by article 108.17 of the QR&O; second where the charges are more serious in nature and require a direct referral to court martial.

⁷ Military judges may not be tried by summary trial.

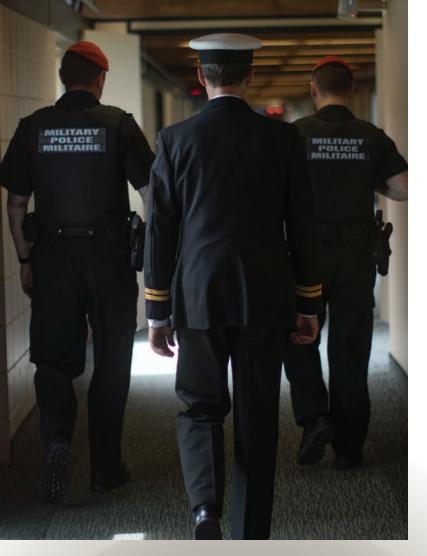
⁸ Two exceptions are specified at Note (B) to article 108.05 of the QR&O:

Two civil offences that may be tried by summary trial are subject to a six-month limitation period under subsection 69(2) of the *National Defence Act*:

⁽i) possession of a substance contrary to subsection 4(1) of the *Controlled Drugs and Substances Act* where the subject-matter of the offence is a substance described in subsection 4(5) of that Act and does not exceed 1 gram in the case of Cannabis resin or 30 grams in the case of Cannabis (marijuana); and

⁽ii) taking of a motor vehicle or vessel without consent contrary to section 335 of the *Criminal Code*.

⁹ QR&O, supra note 3 at paragraph 108.45(8).



Courts Martial

The court martial—a formal military court presided over by a military judge—is designed to deal with more serious offences and has powers of punishment up to and including imprisonment for life. Courts martial are conducted in accordance with rules and procedures similar to those of civilian criminal courts (while taking into account the unique requirements of the military justice system) and have the same rights, powers, and privileges as a superior court of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of [their] jurisdiction." Courts martial can be convened anywhere, in Canada and abroad.

The National Defence Act provides for two types of courts martial: General and Standing. The General Court Martial is composed of a military judge and a panel of five Canadian Armed Forces' members. The panel serves as the trier of fact and decides on any finding of guilty or not guilty. The military judge determines the sentence in the event of a finding of guilt or directs the person be discharged absolutely. At a Standing Court Martial, the military judge sits alone, makes any required findings and, if the accused person is found guilty, imposes the sentence or directs the person be discharged absolutely.

At a court martial, the prosecution is conducted by a military prosecutor under the authority of the Director of Military Prosecutions. The accused is entitled to be represented by defence counsel assigned by the Director of Defence Counsel Services at no cost, or by civilian counsel at his or her own expense.

Bill C-77 will restructure the summary trial process into a non-penal, non-criminal summary hearing process, limited in jurisdiction to service infractions to be created by regulations, and designed to address minor breaches of military discipline. These developments will not only simplify the process at the unit level, but will further enhance the responsiveness and efficiency of the military justice system.

¹⁰ National Defence Act, RSC 1985, c N-5, section 179 [National Defence Act].

Appeal of a Court Martial Decision

Decisions made at courts martial may be appealed to the Court Martial Appeal Court of Canada by the person subject to the Code of Service Discipline or by the Minister or counsel instructed by the Minister. The Court Martial Appeal Court of Canada is composed of civilian judges who are appointed by the Governor in Council from the Federal Court of Appeal, the Federal Court, or from the superior courts and courts of appeal of the provinces and territories.

Court Martial Appeal Court of Canada decisions may be appealed to the Supreme Court of Canada on any question of law on which a judge of the Court Martial Appeal Court of Canada dissents, or on any question of law if leave to appeal is granted by the Supreme Court of Canada.

- Formal proceedings presided over by a military judge
- Designed to deal with more serious offences
- Two types of courts martial: General and Standing
- General court martial is presided over by a military judge with a panel composed of five Canadian Armed Forces members, who serve as the triers of fact and decide unanimously on any finding
- Standing court martial is presided over by a military judge alone. The military judge determines the sentence in both Standing and General courts martial
- Accused person has the right to be represented by Defence Counsel Services at no cost, or by civilian counsel at his or her own expense
- A person found guilty at court martial has the right to appeal to the Court Martial Appeal Court of Canada, and thereafter to the Supreme Court of Canada

¹¹ The Minister of National Defence has instructed the Director of Military Prosecutions to act on his behalf for appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.

STATISTICS

The statistics provided in this chapter are a reflection of the data collected on the military justice system for the 2019/20 reporting period. A number of factors can contribute to variations in the statistics reported in this chapter. During this reporting period, as a result of the COVID-19 pandemic and the activation of Operation LASER, the statistical variability may be greater than previous reporting periods. Although the military justice system is designed to provide operational flexibility, the current operational climate shaped by the COVID-19 pandemic and Operation LASER has resulted in disruption to regular business activities across the Canadian Armed Forces.

While the Office of the JAG has taken all reasonable steps to ensure that the statistical data being reported is accurate, it should be noted that as of the reporting date, the scope and extent of the impact of the COVID-19 pandemic and Operation LASER remains unknown. For example, as of the reporting date, the precise scope of the disruption to regular business activities experienced by units across the Canadian Armed Forces is unclear. Consequently, it is possible that delays in reporting pertinent data may be more prominent during this reporting period than in past reporting periods. As a result, this chapter solely aims to provide available quantitative data on the military justice system during the current reporting period. It is expected that further data and analysis will be outlined in greater detail during the next reporting period.

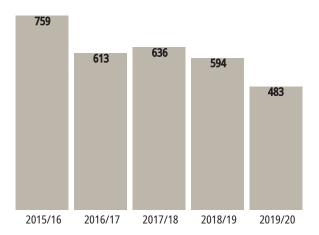
Summary Trials

NUMBER OF SUMMARY TRIALS

Summary trials continue to be the most widely used form of service tribunal in the Canadian Armed Forces to deal with service offences under the Code of Service Discipline. During this reporting period, there were 483 summary trials (as compared to 55 courts martial). Summary trials made up approximately 90% of trials held before service tribunals. Figure 2-1 shows the number of summary trials and courts martial for the last two reporting periods as well as the corresponding percentage of cases tried by each type of service tribunal. Figure 2-2 shows the total number of summary trials by reporting period since 2015/16.

FIGURE 2-1: DISTRIBUTION OF SERVICE TRIBUNALS 2018-201912 2019-2020 % Number of Courts Martial 51 7.9 55 10.22 Number of Summary Trials 594 92.1 483 89.78 **Total** 645 100 538 100

FIGURE 2-2: NUMBER OF SUMMARY TRIALS



¹² All summary trial statistics from the 2018/19 reporting period which are reported in this report may differ from those statistics in the 2018/19 Annual Report of the Judge Advocate General as a result of late reporting by various units across the Canadian Armed Forces.

FIGURE 2-3:					
Number of Summary Trials by Organizations					
	2018-	2018-2019		2019-2020	
	#	%	#	%	
Canadian Army	243	40.91	219	45.35	
Royal Canadian Navy	108	18.18	90	18.63	
Chief of Military Personnel	123	20.71	47	9.73	
Royal Canadian Air Force	61	10.27	63	13.04	
Canada Joint Operations Command	40	6.73	44	9.11	
Canada Special Operations Forces Command	11	1.85	7	1.45	
Vice Chief of Defence Staff	3	0.50	10	2.07	
Assistance Deputy Minister (Material)	1	0.17	1	0.21	
Assistance Deputy Minister (Information Management)	2	0.34	2	0.41	
Canadian Forces Intelligence Command	1	0.17	0	0.00	
Judge Advocate General	1	0.17	0	0.00	

Figure 2-3 shows the total number of summary trials for the last two reporting periods by organization. Figure 2-4 illustrates the number of summary trials specifically for the five following commands: the Canadian Army, the Royal Canadian Navy, the Royal Canadian Air Force, the Chief of Military Personnel, and the Canadian Joint Operations Command since 2015/16.

Total

In this reporting period, the Canadian Army held a total of 219 summary trials as opposed to 243 for the previous reporting period. This is a decrease of 24 summary trials (or approximately 10%) from the 2018/19 reporting period. Since 2015/16 the number of summary trials within the Canadian Army has decreased each year.

Since 2015/16 the Royal Canadian Navy has seen a steady decrease in summary trials. During this reporting period, there were a total of 90 summary trials, as compared to 108 in the previous reporting period. This decrease represents a drop of approximately 16%.

The Royal Canadian Air Force conducted 63 summary trials in this reporting period, a slight increase from 61 in the last reporting period. The number of summary trials in the Royal Canadian Air Force has remained relatively consistent over the past three reporting periods.

The most significant change in the number of summary trials in this reporting period came from the Chief of Military Personnel, which had 47 summary trials compared to 123 in the 2018/19 reporting period. This constitutes a decrease of approximately 62% in the number of summary trials for this command.

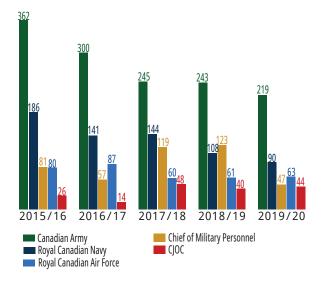
FIGURE 2-4:
NUMBER OF SUMMARY TRIALS FOR THE CANADIAN
ARMY, THE ROYAL CANADIAN NAVY, THE CHIEF
OF MILITARY PERSONNEL, THE CANADIAN JOINT
OPERATIONS COMMAND AND THE ROYAL CANADIAN
AIR FORCE

100

483

100

594

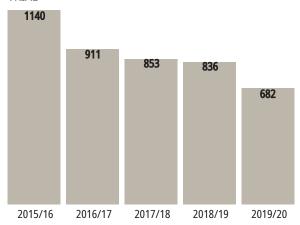


Finally, the Canadian Joint Operations Command held 44 summary trials during this reporting period, an increase of four summary trials in comparison to the 40 summary trials in the previous reporting period.

NUMBER OF CHARGES DISPOSED OF AT SUMMARY TRIAL

In this reporting period, there were a total of 682 charges disposed of at summary trial compared to 836 charges disposed of at summary trial during the 2018/19 reporting period. Figure 2-5 shows the total number of charges disposed of at summary trial since 2015/16, and demonstrates a consistent decrease.

FIGURE 2-5: NUMBER OF CHARGES DISPOSED OF AT SUMMARY TRIAL



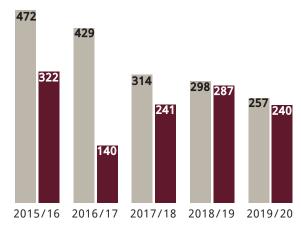
The most common types of offences, which account for approximately 73% of all charges disposed of at summary trial, remain absence without leave and conduct to the prejudice of good order and discipline.¹³

Since the 2015/16 reporting period there has been a consistent decline in the total number of charges reported for absence without leave. In the current reporting period the total number was 257, compared to 472 in the 2015/16 reporting period.

In this reporting period there were a total of 240 charges for the offence of conduct to the prejudice of good order and discipline, which is a broad offence category capturing a large variety of conduct within its scope. Although an increase was reported in the 2018/19 reporting period, where the number of charges reached 287, this year the number of charges for conduct to the

prejudice of good order and discipline has decreased to 240. This is consistent with the numbers from the 2017/18 reporting period. Figure 2-6 shows the number of charges for absence without leave and conduct to the prejudice of good order and discipline between 2015/16 and 2019/20.

FIGURE 2-6: NUMBER OF CHARGES FOR CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE AND ABSENCE WITHOUT LEAVE



- Absence without Leave
- Prejudice to Good Order and Discipline

¹³ National Defence Act, supra note 10, see section 129. This section makes "any act, conduct, disorder or neglect to the prejudice of good order and discipline" an offence under the National Defence Act. This offence is referred to throughout this Annual Report as "conduct to the prejudice of good order and discipline."

NUMBER OF ELECTIONS TO BE TRIED BY COURT MARTIAL

Pursuant to article 108.17 of the *Queen's Regulations and Orders for the Canadian Forces*, in certain circumstances, an accused person has the right to elect to be tried by court martial rather than summary trial. The accused person will not have the opportunity to elect to be tried by court martial if the following criteria apply 1) the accused person has been charged with one of the five "minor" service offences (listed below) and 2) the circumstances surrounding the commission of the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction over the accused person concludes that a punishment of detention, reduction in rank, or a fine in excess of 25% of the accused person's monthly basic pay would not be warranted if the accused person were found guilty of the offence.¹⁴

The five minor offences are: 1) insubordinate behaviour, 2) quarrels and disturbances, 3) absence without leave, 4) drunkenness, and 5) conduct to the prejudice of good order and discipline where the offence relates to military training, maintenance of personal equipment, quarters or workspace, or dress and deportment.

During this reporting period, a total of 144 elections to be tried by court martial were offered to accused persons. Out of the 144 elections offered, 118 accused persons elected to be tried by summary trial, which represents 81.94% of the total elections offered. The remainder of the 26 accused persons elected to be tried by court martial, which represents 18.06% of the total elections offered.

Figure 2-7 represents the percentage of accused persons electing to be tried by court martial, when offered an election, over the past five reporting periods.

Figure 2-8 shows the number of summary trials completed over the past five reporting periods where the accused person was offered an election to be tried by court martial, as well as the number of summary trials completed where no election was offered.

Figure 2-9 shows the number of summary trials completed over the past five reporting periods where the accused person elected to be tried by court martial, expressed as a percentage.

FIGURE 2-7: PERCENTAGE OF ACCUSED ELECTING TO BE TRIED BY COURT MARTIAL

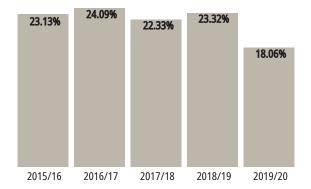


FIGURE 2-8: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ELECTION OFFERED OR NOT OFFERED¹⁵

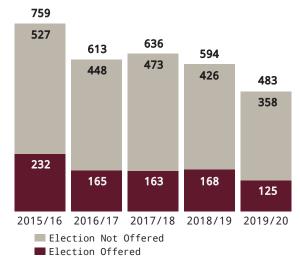
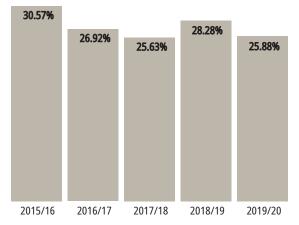


FIGURE 2-9: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ACCUSED OFFERED AN ELECTION, EXPRESSED AS A PERCENTAGE



¹⁵ In some cases, an election can be offered during one reporting period but the summary trial is not completed until the following reporting period.

¹⁴ An accused person will also not have the right to choose to be tried by summary trial in those circumstances where the charges require a direct referral to court martial.

WAIVER OF LIMITATION PERIODS

Pursuant to article 108.16 of the *Queen's Regulations and Orders for the Canadian Forces*, a charge must be laid against an accused person within six months from the date the service offence is alleged to have been committed and the summary trial must commence within one year of that day. Pursuant to article 108.171 of the *Queen's Regulations and Orders for the Canadian Forces*, which came into force on 1 September 2018, an accused person has the right to waive one or both of these limitation periods.¹⁶

In this reporting period there were 36 waivers offered to accused persons. This represents an increase of nine waivers offered from the 2018/19 reporting period. Of those 36 waivers offered, the accused person chose to waive one or both of the limitation periods in 30 cases.

RESULTS BY CHARGE AT SUMMARY TRIAL

The findings at summary trial, by charge, have remained relatively consistent over the last five reporting periods. For example, the percentage of guilty findings has held steady at approximately 91% and the percentage of nonguilty findings has decreased by 36.36% compared to the previous reporting period. A complete breakdown of the total number of findings by charge and the corresponding percentages for the last two reporting periods can be found at Figure 2-10.

Figure 2-10: Findings by Charge				
	2018-2019		2019-2020	
	#	%	#	%
Guilty	755	90.31	620	90.91
Guilty – Special Finding	2	0.24	2	0.29
Guilty of related, less serious or attempted offences	1	0.12	0	0.00
Not guilty	66	7.89	42	6.16
Charge stayed	10	1.20	12	1.76
Charge not proceeded with	2	0.24	6	0.88
Total	836	100	682	100

PUNISHMENTS AND ABSOLUTE DISCHARGES AT SUMMARY TRIAL

In this reporting period, there were a total of 609 punishments and absolute discharges at summary trial.¹⁷ Fines and confinement to ship or barracks continue to be the most commonly imposed punishments. Figure 2-11 shows the total number of punishments and absolute discharges at summary trial for the last two reporting periods as well as the corresponding percent.

FIGURE 2-1	1:		
PUNISHMENTS	ΑT	SUMMARY	T_{RIAL}

	2018-2019		2019-2020	
	#	%	#	%
Detention	11*	1.51	3**	0.49
Reduction in rank	3	0.41	2	0.33
Severe reprimand	4	0.55	2	0.33
Reprimand	21	2.88	23	3.78
Fine	432	59.26	377	61.90
Confinement to ship or barracks	184	25.24	143	23.48
Extra work and drill	44	6.04	52	8.54
Stoppage of leave	11	1.51	6	0.99
Caution ¹⁸	6	0.82	0	0.00
Absolute Discharge ¹⁹	13	1.78	1	0.16
Total	729	100	609	100

^{*} Includes one punishment which was a Suspended Detention

In this reporting period, the punishment of detention was imposed three times. This represents a decrease of approximately 73% from the previous reporting period where 11 punishments of detention were imposed. An overview of the number of times the punishment of detention was imposed at summary trial over the last five reporting periods can be found in Figure 2-12.

^{**} Includes one punishment which was a Suspended Detention

Where one (or both) of the limitation periods have lapsed and the accused person does not provided a waiver, the presiding officer cannot proceed with the matter by way of summary trial. In such circumstances, pursuant to paragraph 108.16(3) of the QR&O, the presiding officer is required to refer the matter to the next superior officer within the disciplinary chain, who could then refer the matter to the Director of Military Prosecutions for consideration. If the Director of Military Prosecutions makes the decision to prefer charges, the matter would proceed by way of court martial.

More than one type of punishment may be imposed at a summary trial.

¹⁸ Effective 1 September 2018, caution has been removed as a minor punishment.

¹⁹ Effective 1 September 2018, in accordance with sub-sections 208.8(1) & (2) of the *National Defence Act*, an accused person who pleads guilty or is found guilty of an offence for which a minimum punishment is prescribed by law or an offence punishable by 14 years or for life – may be directed by a service tribunal to be discharged absolutely, the effect of which is that the offender is deemed not to be convicted of the offence.

FIGURE 2-12:
TOTAL PUNISHMENTS OF DETENTION

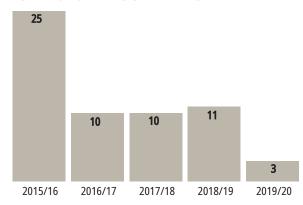
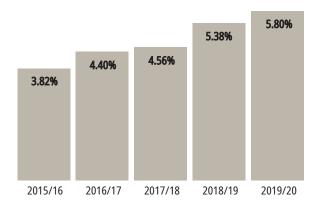


FIGURE 2-13: PERCENTAGE OF SUMMARY TRIALS REVIEWED



DECISIONS OF REVIEW AUTHORITY 2018-2019 2019-2020 % % Upholds decision 29.73 9 27.28 Quashes findings 29.73 14 42.42 Substitutes findings 2.70 3.03 1 Substitutes punishment 9.09 16.22 Mitigates / commutes / remits 21.62 6 18.18 punishment

 37^{20}

100 3321

100

FIGURE 2-14:

Total

SUMMARY TRIAL REVIEWS

In the current reporting period, a total of 28 summary trials were reviewed based on requests by members found guilty at summary trial or on a review authority's own initiative, pursuant to articles 108.45 and 116.02 of the *Queen's Regulations and Orders for the Canadian Forces*. Of a total of 483 summary trials, 5.8% of cases were reviewed. This is a slight increase from the previous reporting period, when 5.38% of cases were reviewed. Of those reviews, eight were based on findings, 14 were based on sentences, and six were based on both findings and sentences. Figure 2-13 shows the percentage of cases for which a review has been conducted since 2015/16.

Based on the nature of the request for review, the review authority has several options available to them in rendering a decision. A review authority might uphold the decision of the presiding officer, quash a finding of guilt, or substitute a finding or punishment. In 42.42% of decisions, the review authority quashed the decision of the presiding officer. In 27.27% of decisions, the review authority upheld the decision of the presiding officer. A complete breakdown of all decisions of a review authority for the past two reporting periods can be found at Figure 2-14.

²⁰ In five cases, the review authority took two separate decisions in one request for review.

²¹ In five cases, the review authority took two separate decisions in one request for review.

HARMFUL AND INAPPROPRIATE SEXUAL BEHAVIOUR AND SEXUAL MISCONDUCT

At the summary trial level, harmful and inappropriate sexual behaviour and sexual misconduct are most frequently charged under section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline. In the current reporting period there were a total of 30 charges for harmful and inappropriate sexual behaviour and sexual misconduct, compared to 45 charges in the previous reporting period.

Of the 30 charges of this nature during this reporting period, there were 28 findings of guilt and two findings of not guilty. In the previous reporting period, there were 37 findings of guilt, six findings of not guilty, and two charges which were stayed.

LANGUAGE OF SUMMARY TRIALS

Pursuant to article 108.16 of the *Queen's Regulations and Orders for the Canadian Forces*, an accused member has the right to be tried in the official language of their choice. The presiding officer must be able to understand the language in which the proceedings are to be conducted without the assistance of an interpreter.

In this reporting period, approximately 77% of summary trials were conducted in English and approximately 23% were conducted in French. This shows a slight decrease in summary trials conducted in English and a slight increase in summary trials conducted in French, when compared to previous reporting periods. Figure 2-15 shows the total number of summary trials conducted in both English and French for the past two reporting periods.

Figure 2-15: LANGUAGE OF SUMMARY TRIALS				
2018-2019		2019-2020		
	#	%	#	%
Number in English	479	80.64	373	77.23
Number in French	115	19.36	110	22.77
Total	594	100	483	100



Timelines for Summary Trials

The purpose of the summary trial system is to provide prompt but fair justice in respect of minor service offences. As such, these trials are required to begin within one year of the date on which the offence is alleged to have occurred, unless this limitation period is waived by the accused person.²²

This reporting period saw 483 summary trials, and the average time from the alleged offence to the conclusion of the summary trial was approximately 108 days. Of those 483 summary trials, 280 were concluded within 90 days of the alleged offence, representing approximately 58% of all summary trials for the reporting period. Further, 82.6% of all summary trials were concluded within 180 days of the alleged offence. Figure 2-16 shows a breakdown of the number of days from the alleged offence to the conclusion of the summary trial.

Once a charge has been laid by the appropriate authority and is referred to a presiding officer, the presiding officer may be required to obtain legal advice before commencing the summary trial.²⁴ Once that advice has been received from the unit legal adviser, the presiding officer may commence the summary trial. Current reporting capabilities do not provide data on the length of summary trials, however with the continued development of the Justice Administration and Information Management System, this data will be available to the Office of the JAG in future reporting periods.

Over the past five reporting periods, the average number of days between the time a charge is laid to the conclusion of the summary trial has fluctuated, reaching a low of 15 days in the 2017/18 reporting period. During the current reporting period, this number has increased to approximately 25 days. Figure 2-17 shows the average number of days from charge laid to the conclusion of the summary trial over the last five reporting periods.

FIGURE 2-16: NUMBER OF DAYS FROM ALLEGED OFFENCE TO THE CONCLUSION OF THE SUMMARY TRIAL FOR REPORTING PERIOD 2019/20²³

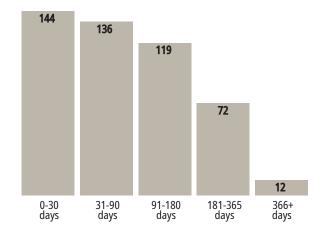
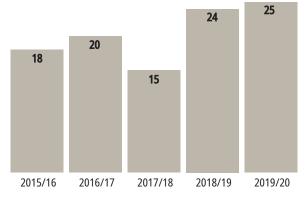


FIGURE 2-17: AVERAGE NUMBER OF DAYS FROM CHARGE LAID TO SUMMARY TRIAL



²² National Defence Act, supra note 10, see sub-sections 163(1.1) and (1.2) and 164(1.1) and (1.2).

²³ Effective 1 September 2018, the accused person may waive the one year limitation period to commence a summary trial.

²⁴ QR&O, supra note 3 at article 107.11.

Courts Martial²⁵

NUMBER OF COURTS MARTIAL

During this reporting period, there were a total of 55 courts martial, representing approximately 10% of all trials held before service tribunals. This is a slight increase from the previous reporting period. Figure 2-18 demonstrates the number of courts martial by year since 2015/16.

RESULTS BY CASE AT COURT MARTIAL

Of the 55 courts martial held this reporting period, 44 cases resulted in a finding of guilt on at least one charge and seven cases resulted in a finding of not guilty on all charges. Figure 2-19 shows disposition by case over the past two reporting periods.

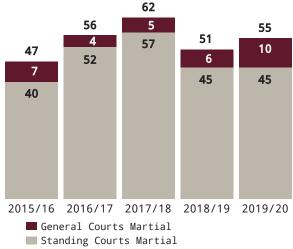
DIRECTOR OF MILITARY PROSECUTIONS CASE MANAGEMENT

REFERRALS

During this reporting period, the Directorate of Military Prosecutions received a total of 76 referrals as compared to 102 in the previous reporting period, a decline of 25.5%. There were also 54 cases carried over from the previous reporting period resulting in a total of 130 referrals processed in 2019/20 as compared to 172 in 2018/19, a decrease of 24.42%. Of these 130 cases, postcharge decisions were made by the Canadian Military Prosecution Service in 87 cases, with the remainder carried over to the next reporting period.

Figure 2-20 shows the number of referrals received from the Director of Military Prosecutions over the last five reporting periods with a comparison as to how many were processed within each respective reporting period.

FIGURE 2-18: NUMBER OF COURTS MARTIAL



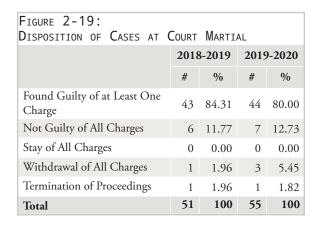
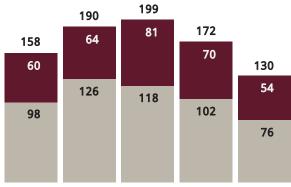


FIGURE 2-20: NUMBER OF REFERRALS



2015/16 2016/17 2017/18 2018/19 2019/20

- Cases Carried Over From Previous Reporting Period
- Number of Referrals Received During Current Reporting Period

See Annex C for the Director of Military Prosecutions' Annual Report and further statistical data.

PREFERRALS AND NON-PREFERRALS²⁶

During this reporting period, there were 56 cases preferred for trial by court martial and 31 cases in which no charges were preferred. The percentage of cases preferred for trial by court martial for this reporting period was 64.37%. This number represents a slight decrease from the 2018/19 reporting period in which 107 cases were preferred, or 69%. In the past five reporting periods, the highest rate of preferrals was 69% in the previous reporting period and the lowest rate of preferrals was 57% in the 2017/18 reporting period.

Figure 2-21 illustrates the number of files preferred by the Director of Military Prosecutions and the number of files where no charges were preferred over the past five reporting periods.

TIMELINES

During this reporting period, the average number of days from referral of a matter to the Director of Military Prosecutions until a post-charge decision was approximately 70 days, a decrease of approximately 18 days, or 20.45% from the previous reporting period. Figure 2-22 illustrates the average number of days from referral to post-charge decision over the course of the past five reporting periods.

During this reporting period, the average length of time it took for the commencement of a court martial following the preferral of charges was 278 days, an increase from the previous reporting period by 34 days, or 13.93%. The average number of days from the preferral of a charge to the commencement of a court martial in the previous reporting period was 244 days. Figure 2-23 demonstrates, over the past five reporting periods, the average length of time for a court martial to commence once charges against an accused person were preferred.

FIGURE 2-21: NUMBER OF PREFERRALS AND NON-PREFERRALS

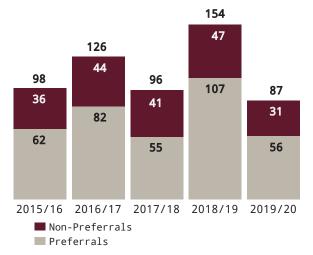


FIGURE 2-22: NUMBER OF DAYS FROM REFERRAL OF FILE TO THE DIRECTOR OF MILITARY PROSECUTIONS TO POST-CHARGE DECISION

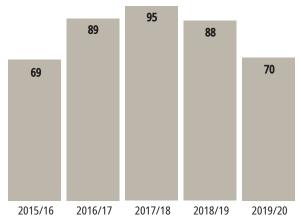
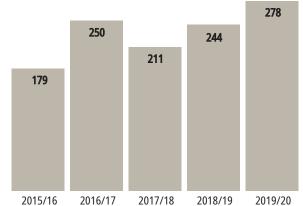


FIGURE 2-23: Number of Days from Preferral of Charges to Beginning of Court Martial



²⁶ In accordance with the Director of Military Prosecutions Policy Directive # 003/00, Post Charge Review, when considering whether or not a charge will be preferred, the Prosecutor must determine if there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued at the post-charge stage. Further information concerning the Director of Military Prosecutions Policies regarding post-charge review can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html.

PUNISHMENTS AT COURT MARTIAL

In the 2019/20 reporting period, 42 sentences were pronounced by courts martial, involving a total of 63 punishments. The most common punishments imposed continue to be fines (32 in total), representing 51% of punishments, followed by 15 severe reprimands (24% of punishments). A total of three custodial punishments, representing approximately 5% of punishments, were imposed by courts martial, including two imprisonments and one detention. Figure 2-24 breaks down the punishments imposed by courts martial over the past two reporting periods.

FIGURE 2-2	4:		
PUNISHMENTS	АТ	Courts	MARTIAL

I UNISHWENIS AT COURTS WARTIAL				
	2018-2019	2019-2020		
Dismissal	2	1		
Imprisonment	3	2**		
Detention	1*	1***		
Reduction in Rank	2	3		
Forfeiture of Seniority	0	1		
Severe Reprimand	10	15		
Reprimand	4	6		
Fine	35	32		
Confinement to ship or barracks	0	0		
Stoppage of Leave	0	0		
Absolute Discharge	0	2		
Total	57	63		

^{*} This punishment was suspended by the Military Judge.

SEXUAL MISCONDUCT

A total of 25 courts martial dealing with sexual misconduct charges were completed during this reporting period. Of those, 18 cases resulted in a finding of guilt on at least one charge, five cases resulted in a finding of not guilty, one case resulted in a stay of proceedings, and in one case all charges were withdrawn by the Director of Military Prosecutions. In the 2018/19 reporting period a total of 20 courts martial dealt with charges of sexual misconduct, with 14 of those resulting in a guilty finding. This reporting period saw an increase of 25% in the number of courts martial dealing with sexual misconduct and an increase of approximately 29% in the number of guilty findings.

^{**} One of these punishments was suspended by the Military Judge.

^{***} This punishment was suspended by the Military Judge.





MILITARY JUSTICE: JURISPRUDENCE, LEGISLATIVE DEVELOPMENTS, PARLIAMENTARY REVIEW, POLICY INITIATIVES, AND OTHER DEVELOPMENTS

INTRODUCTION

The 2019/20 reporting period marked the realization of a series of significant jurisprudential, legislative, and policy developments, all of which have helped define a "new era" for military justice in Canada. This "new era" is characterized by efficiency, fairness, effectiveness, and unambiguous constitutional legitimacy. This chapter highlights the significant developments which have impacted the military justice system over the course of this reporting period.

JURISPRUDENCE

Supreme Court of Canada

RIGHT TO A JURY TRIAL PURSUANT TO SECTION 11(F) OF THE CHARTER OF RIGHTS AND FREEDOMS

R v Stillman, 2019 SCC 40

In *R v Stillman*, the Supreme Court of Canada considered the constitutionality of paragraph 130(1)(a) of the *National Defence Act*, which transforms most civil offences committed by persons subject to the Code of Service Discipline, into service offences, thereby giving the military justice system concurrent jurisdiction over such offences. The central argument before the Supreme Court of Canada focused on whether paragraph 130(1)(a) of the *National Defence Act* violated an accused

service member's right to a jury trial guaranteed under section 11(f) of the *Charter of Rights and Freedoms* (*Charter*). Section 11(f) of the *Charter* provides that anyone charged with an offence, where the maximum punishment is imprisonment for five years or more, has the right to a trial by jury, except in the case of an offence under military law tried by military tribunal.

The Court Martial Appeal Court of Canada considered this issue on three separate occasions. In R v Royes,1 a unanimous panel of the Court concluded that paragraph 130(1)(a) of the National Defence Act fell within the exception to the right to a trial by jury in section 11(f) of the Charter. In R v Déry,2 a new panel of the Court concluded that it was bound by the decision in R v Royes due to the principles of judicial comity and horizontal stare decisis, although the majority of the panel commented that it would have found paragraph 130(1)(a) of the National Defence Act unconstitutional. Finally, in R v Beaudry,3 the Court found that paragraph 130(1)(a) of the National Defence Act violated the right of an accused to a jury trial guaranteed by section 11(f) of the Charter and declared paragraph 130(1)(a) of the National Defence Act to be unconstitutional and of no force or effect in its application to any civil offence for which the maximum sentence is five years of imprisonment or more.

At the Supreme Court of Canada, a majority of the Court ruled that paragraph 130(1)(a) of the *National Defence*

¹ R v Royes, 2016 CMAC 1.

² R v Déry, 2017 CMAC 2. A number of the appellants in this decision were subsequently granted leave to appeal to the Supreme Court of Canada under the name of Stillman.

³ R v Beaudry, 2018 CMAC 4.

Act is consistent with section 11(f) of the Charter. The Court confirmed that Parliament has the power over Militia, Military and Naval Service, and Defence under section 91(7) of the Constitution Act of 1867, and could therefore validly enact the service offences referred to as an offence under military law in section 11(f) of the Charter. The Court noted that a civil offence tried as a service offence under paragraph 130(1)(a) of the National Defence Act was no less an offence under military law than purely military offences prescribed in the Code of Service Discipline. Furthermore, and relying on its past reasoning in R v Moriarity,4 the Court held that an accused person's status as a service member was sufficient to charge a person pursuant to paragraph 130(1)(a) of the National Defence Act, and that a military nexus was not required. As a result, the Supreme Court of Canada concluded that where a serious civil offence is tried as a service offence under paragraph 130(1)(a) of the National Defence Act, it qualifies as an offence under military law and thereby engages the military exception in section 11(f) of the Charter.

"... a serious civil offence tried as a service offence under s. 130(1)(a) — whether or not there is a heightened "military nexus" — qualifies as "an offence under military law" for the purposes of s. 11(f) of the Charter."⁵

The Court went on to state that the purpose of the military exception found in section 11(f) of the *Charter* is to acknowledge the need for, and existence of, a separate military justice system tailored to the unique needs of the military. The Court reaffirmed that the military justice system ensures the maintenance of discipline, efficiency, and morale of the military, as it had previously recognized in *R v Généreux*⁶ and in *R v Moriarity*. In a thorough assessment of the evolution of the military justice system, the Supreme Court of Canada recognized the dynamic nature of the military justice system and the fact that it has evolved to be a "full partner in administering justice alongside the civilian justice system," and a "parallel system of justice which largely mirrors the civilian criminal justice system."

In its decision, the Supreme Court of Canada also recognized the unique and important role of military panels. While the Court noted some similarities with civilian juries, it clearly distinguished military panels from civilian juries, observing that military panels need to be different so as to meet the unique objectives of the military justice system in fostering discipline, efficiency, and morale in the Canadian Armed Forces. According to the Court, the fact that panel members bring military experience and integrity to the military judicial process, and that a jury of Canadian civilians would be difficult, if not impossible, to convene outside Canada, demonstrated why military panels need to be different from a jury. The Court went on to observe that, although different, military panels provide a similar level of Charter protection to accused persons as civil juries, while addressing the unique objectives of the military justice system.9

In conclusion, through its decision in R v Stillman, the Supreme Court of Canada unambiguously affirmed the need for a separate system of military justice in Canada and confirmed that the system is constitutional, valid, necessary, and a full partner in the administration of justice with the civilian justice system. Following the Supreme Court of Canada's decision, the Court Martial Appeal Court of Canada's declaration of invalidity of paragraph 130(1)(a) of the National Defence Act was set aside, and the military justice system's ability to prosecute serious civil offences, where appropriate, was reinstated.

The military justice system is "... a full partner in administering justice alongside the civilian justice system" and a "parallel system of justice which largely mirrors the civilian criminal justice system."

⁴ R v Moriarity, 2015 SCC 15.

⁵ R v Stillman, 2019 SCC 40 at paragraph 113 [Stillman].

R v Généreux, [1992] 1 S.C.R. 259 [Généreux].

⁷ Stillman, supra note 5 at paragraph 20.

⁸ Ibid at paragraph 53.

Two justices of the Supreme Court of Canada dissented from the majority and concluded that paragraph 130(1)(a) of the *National Defence Act* infringes on section 11(f) of the *Charter* to the extent that it deprives an accused of the right to trial by jury for serious offences where there is no military connection. Without striking down the impugned provision, the minority would have brought it into compliance with section 11(f) of the *Charter* by reading in a military connection requirement to paragraph 130(1)(a) of the *National Defence Act* to allow courts martial to only hear cases that involve offences committed in circumstances that are so connected to the military that it would have a direct effect on military discipline, efficiency, and morale.

Federal Court

REQUESTING THE ASSIGNMENT OF A MILITARY JUDGE IN THE COURT MARTIAL CASE OF *R v Dutil*

CANADA (DIRECTOR OF MILITARY PROSECUTIONS) V CANADA (OFFICE OF THE CHIEF MILITARY JUDGE), 2020 FC 330

The Canadian Forces National Investigation Service began to investigate allegations of impropriety with respect to the Chief Military Judge, Colonel Mario Dutil, in 2015. On 25 January 2018, he was charged with eight offences under the Code of Service Discipline based on allegations of fraud, falsely claiming travel expenses, and having an inappropriate relationship with a subordinate. Colonel Dutil's court martial was convened on 10 June 2019 before the Deputy Chief Military Judge, Lieutenant Colonel Louis-Vincent D'Auteuil. Defence counsel requested recusal on the basis of a reasonable apprehension of bias, citing the close personal relationship between the accused and the Deputy Chief Military Judge (among other issues).

On 17 June 2019 the Deputy Chief Military Judge granted the accused's application and recused himself in the case of *R v Dutil.*¹⁰ Immediately following this decision, the Deputy Chief Military Judge issued a letter advising that he would not assign any other military judge to preside and adjourned proceedings to an undetermined date.

The Director of Military Prosecutions subsequently sought judicial review at the Federal Court, specifically requesting that the Federal Court order the Deputy Chief Military Judge to assign another judge to the case, pursuant to section 165.25 of the *National Defence Act*. In the alternative, the Director of Military Prosecutions requested that the Federal Court set aside the decision not to assign any other military judge.

The application for judicial review was dismissed. In its analysis, the Federal Court considered the fundamental rights of the accused to be tried within a reasonable time and to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal, as provided for in sections 11(b) and (d) of the *Charter*. The right of the accused to choose the language of trial was another important consideration.

After confirming that it had the required jurisdiction to review the impugned decision, the Federal Court ruled that the decision was reasonable in all respects and that it did not contain reviewable errors. The Federal Court found that the decision to adjourn the proceedings indeterminately and not to assign a replacement military judge preserved the rule of law as well as the accused's right to a fair trial. The Court outlined that exercising the power to assign military judges must not only be consistent with the *Charter* but also not result in a miscarriage of justice. The Federal Court also deferred to the judgment of the Deputy Chief Military Judge in the exercise of his duty to assess whether another military judge is well suited to be assigned a case.

Court Martial Appeal Court of Canada

NECESSITY TO ESTABLISH A *PRIMA FACIE* CASE IN RESPECT OF CHARGES LAID

R v BANTING, 2019 CMAC 5

Lieutenant Banting was found not guilty by way of directed verdict at his court martial. The military judge found that no *prima facie* case had been made out on a charge preferred against the accused of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*. The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed to the Court Martial Appeal Court of Canada seeking to overturn the military judge's decision. The appellant argued that the military judge erred in law in finding that no *prima facie* case had been made out in respect of the charge.

In unanimously dismissing the appeal, the Court Martial Appeal Court of Canada held that it agreed with the military judge's view that there was no evidence upon which a reasonable panel of a General court martial, properly instructed, could return a guilty verdict on the charge of prejudice to good order and discipline. The Court concluded that the military judge correctly applied the law as it relates to the failure to establish a *prima facie* case and therefore dismissed the appeal.

[&]quot;These are fundamental, non-negotiable rights that cannot be restricted for reasons of administrative convenience, such as a shortage of military judges."¹¹

¹⁰ R v Dutil, 2019 CM 3003 [Dutil 1]. (See summary of Court Martial decision in below section Court Martial – Decisions of Note).

¹¹ Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge), 2020 FC 330 at paragraph 130 [Dutil 2].

INTERPRETATION OF DISGRACEFUL CONDUCT AND CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

R v BANNISTER, 2019 CMAC 2

Captain Bannister was charged with making inappropriate sexual comments in the workplace. The court martial initially found him not guilty of all three charges of disgraceful conduct contrary to section 93 of the *National Defence Act* and three alternative charges of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*. The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the decision. The Court Martial Appeal Court of Canada concluded that the military judge had erred in law, and therefore granted the appeal. The decision at court martial was set aside and the Court directed that a new trial take place before a different military judge.

The Court Martial Appeal Court of Canada observed that courts martial have utilized different tests over the years to determine whether conduct was disgraceful pursuant to section 93 of the National Defence Act. The Court stressed that there should not exist separate methods of assessing disgraceful conduct, but rather a single objective standard. The Court held that military judges must analyse the conduct at issue by considering it within the totality of the context in which it occurred. The Court went on to observe that there are not two separate silos, one for "shockingly unacceptable" conduct and one for consequences related to "harm or risk of harm" stemming from the conduct. Both methods are, but parts of, the required contextual assessment. The Court further asserted that within the military context, the military judge remains the expert on the issue of disgraceful conduct, and that no other expert evidence will be required, nor permitted.

"... a military judge is expected to judge cases by applying his or her experience and general service knowledge."¹²

Regarding section 129 of the *National Defence Act*, the Court Martial Appeal Court of Canada held that the military judge conflated the concept of judicial notice with the concept of using military experience and general service knowledge to make inferences. The Court reiterated the principle of *Smith v The Queen*¹³ according to which a "service tribunal may apply its general military

knowledge as to what good order and discipline require under the circumstances, and so come to a conclusion whether the conduct, disorder, or neglect complained of was to the prejudice of both good order and discipline." ¹⁴

The military judge is "... not only entitled, but obliged to use the inferential reasoning process." 15

In referencing *R v Jones*¹⁶ and *R v Golzari*, ¹⁷ the Court also reaffirmed that the prejudice does not need to be confined to a physical manifestation of injury to good order and discipline. It specified that proof of prejudice can be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. Prejudice encapsulates conduct that "tends to" or is "likely to" adversely affect discipline.

TIME AND PLACE AS ELEMENTS OF AN OFFENCE

R v EDWARDS, 2019 CMAC 4

Charged with one count of prejudice to good order and discipline for the use of cocaine, contrary to section 129 of the *National Defence Act*, Leading Seaman Edwards was acquitted at court martial on the basis that the prosecution failed to prove that any cocaine usage occurred at the place and within the time period stated in the charge sheet.

The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the court martial decision. On appeal, the Court Martial Appeal Court of Canada held that, unless the time of the offence is an essential/critical element of the offence, crucial to the defence, or misleading given the offence as particularized, a date or time period specified in an indictment is not held to be a material matter. The evidence in this case was not circumstantial and therefore no potential for confusion was possible. The Court held that in the circumstances of this case, the place of the offence only became relevant for territorial jurisdiction.

The acquittal was set aside and a new trial ordered. The court martial is to be heard during the next reporting period.

¹² R v Bannister, 2019 CMAC 2 at paragraph 28 [Bannister].

¹³ Smith v The Queen, (1961) 2 C.M.A.R. 159.

¹⁴ Bannister, supra note 12 at paragraph 66.

¹⁵ *Ibid* at paragraph 68.

¹⁶ R v Jones, 2002 CMAC 11.

¹⁷ R v Golzari, 2017 CMAC 3.

MENS REA ELEMENTS FOR SEXUAL ASSAULT AND THE DEFENCE OF HONEST BUT MISTAKEN **BELIEF IN CONSENT**

R v MacIntyre, 2019 CMAC 3

Sergeant MacIntyre was acquitted at court martial of one charge of sexual assault contrary to section 271 of the Criminal Code and punishable under paragraph 130(1)(a) of the National Defence Act. After the court martial heard all the evidence, the accused requested that a defence of honest but mistaken belief in consent be put to the General court martial panel. The military judge refused to put the defence to the panel after having determined that, on the facts, there was no air of reality to the defence. The military judge provided instructions to the panel as to the relevant legal principles as well as reasonable doubt, before the panel deliberated and returned its verdict of not guilty. These instructions served as the basis for the subsequent appeal to the Court Martial Appeal Court of Canada. The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the decision and specifically challenged the instructions relating to the accused's knowledge of the complainant's lack of consent as well as inadequate police investigation.

On appeal, it was argued that knowledge of lack of consent is not an element of the offence, but instead only arises if there is an air of reality to an honest but mistaken belief in consent. Given the military judge's ruling that there was no air of reality to the defence of honest but mistaken belief in consent, the appellant argued that there was no requirement to prove the element of knowledge of absence of consent. The Court Martial Appeal Court of Canada rejected this argument citing settled law by the Supreme Court of Canada that knowledge, wilful blindness, or recklessness as to the victim's lack of consent is an essential mens rea element of sexual assault. The Court clarified that trial judges cannot repackage the defence of honest but mistaken belief as the mens rea element when it has no air of reality, but it is not an error of law to instruct the trier of fact on the element of knowledge of lack of consent.

element of sexual assault."18

The Director of Military Prosecutions also challenged the military judge's instructions to the panel concerning the evidence heard during trial of an inadequate police

investigation. The appellant argued that the military judge effectively provided instructions to acquit, so long as the panel found that the police investigation was inadequate. The Court Martial Appeal Court of Canada disagreed with this characterization of the instructions and rejected the appellant's argument. The Court held that the instructions, when read as a whole, could not have resulted in any confusion for the panel as to the role of the police investigation. The Court indicated that the panel was entitled to consider the police investigation in the context of assessing the credibility and reliability of the witnesses. Moreover, the Court held that the failure of the appellant to object at trial demonstrated their satisfaction with the instruction, which was a factor to be considered on appeal.

The Court Martial Appeal Court of Canada dismissed the appeal in its entirety. The Minister of National Defence, as represented by the Director of Military Prosecutions, petitioned the Supreme Court of Canada for leave to appeal from the judgment of the Court Martial Appeal Court of Canada. The Supreme Court of Canada dismissed the application for leave.

Court Martial — Decisions of Note

CHIEF MILITARY JUDGE – RECUSAL OF TRIAL **JUDGE**

R v Dυττι, 2019 CM 3003

In 2015, then Chief Military Judge Colonel Mario Dutil was under investigation by the Canadian Forces National Investigation Service. On 25 January 2018, he was charged with eight offences under the Code of Service Discipline based on allegations of fraud, falsely claiming travel expenses, and having an inappropriate relationship with a subordinate

On 15 June 2018, following the laying of these charges, the accused delegated to the Deputy Chief Military Judge, Lieutenant-Colonel Louis-Vincent D'Auteuil, the authority to assign military judges to preside at court martial.

At the commencement of his court martial on 10 June 2019, the accused faced four charges: one count of willfully making false statements contrary to section 125(a) of the National Defence Act, one count of fraud contrary to section 380 of the Criminal Code and punishable under section 130 of the National Defence Act, one count of an act of fraudulent nature contrary to

[&]quot;... knowledge, wilful blindness, or recklessness as to the complainant's lack of consent is an essential mens rea

section 117(f) of the *National Defence Act*, and one count of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*.

At the opening of his trial before the Deputy Chief Military Judge, the accused requested the recusal of the military judge. The accused claimed that the military judge did not have, in fact or in appearance, the independence and impartiality required to preside at his trial. On 17 June 2019, the military judge recused himself, adjourned the proceedings to an indeterminate date and read into the record a letter outlining his decision not to assign any other military judge to the case.

The decision outlined that the test for recusal is whether a well-informed person examining the issue in detail, in a realistic and practical manner, would be left with a reasonable apprehension of bias. The Court noted that decision-makers must be—and appear to be—unbiased, as discussed by the Supreme Court of Canada in $R \ v \ S \ (R.D.).^{19}$ The Court also noted the rigor with which it must analyze the question of impartiality, as previously declared by the Supreme Court of Canada in $R \ v \ G\acute{e}n\acute{e}reux^{20}$ and $R \ v \ Leblanc.^{21}$ The Court further highlighted the importance of the presumption of innocence and the fact that the potential criminal consequences of the case included imprisonment.

The accused testified that the military judge had become a friend and confidant who had helped in dealing with the alleged personal relationship once terminated. The military judge was also aware of some of the contextual elements surrounding the impugned incidents. According to the Court, another decisive factor was the close professional relationship existing between military judges and court reporters, and the fact that many of the witnesses called were former or current court reporters from the Office of the Chief Military Judge. The Court came to the conclusion that a well-informed person, having examined the matter in a realistic and practical way, would conclude that the military judge was biased.

The Director of Military Prosecutions raised the question of conducting the trial within a reasonable time frame as well as the doctrine of necessity – in order to avoid a situation where it becomes impossible to proceed with the case. The Court rejected both arguments and noted that the parties were responsible for the conduct of the

"Colonel Dutil has the right to be tried by an independent and impartial military judge, like any person subject to the Code of Service Discipline. Public trust towards the military justice system, and particularly the military members' trust, rests on the fact that, among other things, such independence and impartiality is not only perceived but also exists in reality."²²

Before adjourning the proceedings to an indeterminate date, the Deputy Chief Military Judge read into the record his decision not to assign any other military judge to the case. This decision was appealed to the Federal Court in the case of *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*.²³ The Federal Court ultimately dismissed the appeal (see summary above) and shortly thereafter the Director of Military Prosecutions announced the withdrawal of all charges against the accused.

NECESSITY TO ESTABLISH A *PRIMA FACIE* CASE IN RESPECT OF CHARGES LAID

R v BANTING, 2019 CM 2009

Lieutenant Banting faced one charge for conduct to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act*. The charge stemmed from the alleged use of inappropriate sexualized language while the accused was instructing at a military course. The accused was tried by General court martial and, at the end of the prosecution's case, brought before the court martial an application for a directed verdict, pursuant to paragraph 112.05(13) of the *Queen's Regulations and Orders for the Canadian Forces*.²⁴

case, were aware of the applicable law, and were not in a situation where it had become impossible for another military judge to preside over the case. While certain evidence had demonstrated that some of the military judges could face recusal or could not preside over a contested trial in French, the court martial found it had not been established that another military judge or Reserve Force military judge could not be assigned in the circumstances, particularly given that the issue had been known for some time.

¹⁹ R v S (R.D.), [1997] 3 SCR 484.

²⁰ Généreux, supra note 6.

²¹ R v Leblanc, 2011 CMAC 2.

²² Dutil 1, supra note 10 at paragraphs 106 and 107.

²³ Dutil 2, supra note 11 (See summary of Federal Court decision in above section – Federal Court).

²⁴ Paragraph 112.05(13) of the Queen's Regulations and Orders for the Canadian Forces [QR&O].

The accused argued that the prosecution had not introduced evidence sufficient to prove the essential elements of the impugned offence, including the actual prejudice to good order and discipline. In contrast, the prosecution argued that the alleged conduct breached Operation HONOUR and that, pursuant to subsection 129(2) of the *National Defence Act*, prejudice may be inferred from the breach of an order.

In considering the accused's application, the military judge examined the evidentiary record before the court to determine whether there was some evidence upon which a properly instructed panel might convict the accused. This included all the documentary evidence tendered relating to Operation HONOUR, such as the Canadian Forces General Message 130/15, Chief of the Defence Staff (CDS) Operation Order - Operation HONOUR and its accompanying documents and training packages. After an examination of the evidentiary record, the military judge concluded that the evidence was insufficient to prove that the alleged conduct resulted in prejudice to good order and discipline. The military judge opined that the CDS Operation Order was not the type of order envisaged under subsection 129(2) of the National Defence Act. The military judge held that the CDS Operation Order and its supporting documents were focused on eliminating conduct described by the conjoined term "harmful and inappropriate sexual behavior" (HISB), that the alleged conduct did not fit within the definition of HISB, and that it fell outside the scope of the conduct captured by the CDS Operation Order and its supporting documentation. As such, the Court could not expect a properly instructed panel to rely upon these documents to infer prejudice from the alleged conduct.

"... the CDS Op Order - Op HONOUR is not the type of order envisaged under subsection 129(2). [...] Op HONOUR and its FRAGOs set out clear direction to the chain of command on how to deal with issues of inappropriate conduct in accordance with extant policy and the law. It does not establish new law or policies." ²⁵

In directing a not guilty verdict, the military judge concluded that the accused had demonstrated, on a balance of probabilities, that no evidence was adduced to prove that the alleged conduct violated the CDS Operation Order.

PERCEPTION OF JUDICIAL INDEPENDENCE OF MILITARY JUDGE

R v PETT, 2020 CM 4002

Master Corporal Pett was charged with two offences: one count of insubordinate behavior contrary to section 85 of the National Defence Act, and one count of abuse of subordinates contrary to section 95 of the National Defence Act. Prior to the commencement of the trial, the accused filed a plea in bar of a trial, pursuant to article 112.24 of the Queen's Regulations and Orders for the Canadian Forces, challenging the independence of military judges.²⁶ The accused argued that an order issued by the Chief of the Defence Staff on 2 October 2019 subjected military judges to the disciplinary authority of a general officer in the military hierarchy, which violated the constitutional principles of judicial independence and of an accused's right to be tried by an independent and impartial tribunal, guaranteed under section 11(d) of the Charter. The subject order designated the Deputy Vice Chief of the Defence Staff to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge.

The military judge hearing the preliminary application found that military judges, as officers in the Canadian Armed Forces, are liable to be charged and dealt with under the Code of Service Discipline while they hold their judicial office. The military judge determined that this could lead an informed observer to reasonably conclude that military judges do not enjoy the essential conditions of judicial independence. The military judge reasoned, however, that the National Defence Act and its regulations provide a number of safeguards designed to regulate the conduct of military judges while ensuring that they are immune from any disciplinary or administrative measures initiated by the executive. Another significant safeguard identified by the Court was the powers exercised by the Military Judges Inquiry Committee which, as a body of judicial peers, can evaluate the fitness and conduct of military judges.

These safeguards were found to be sufficient to ensure that the system would not give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed observer. The subject order, however, imposed a disciplinary process driven by the chain of command to run parallel to the existing legislative and

²⁵ R v Banting, 2019 CM 2009 at paragraph 29.

regulatory safeguards, thereby effectively undermining judicial independence and giving rise to a reasonable apprehension of bias. The military judge therefore declared the subject order to be unlawful and of no force or effect as it pertains to military judges.

"A reasonable observer considering the order expressing the desire to submit military judges to a disciplinary process initiated by the executive over the legislated process administered by judicial peers could reasonably apprehend that the military judge could be biased in favour of the executive in the performance of his or her duties." ²⁷

In finding the Chief of the Defence Staff Order to be of no force or effect as it pertains to military judges, the military judge in the case held that any violation of the accused's right to be tried by an independent and impartial tribunal under section 11(d) of the *Charter* had been rectified. The military judge therefore dismissed the accused's application for a stay of proceedings.

R v D'Amico, 2020 CM 2002

Corporal D'Amico was charged with one count of neglect to the prejudice to good order and discipline pursuant to section 129 of the *National Defence Act*. Prior to the commencement of his trial, the accused brought a plea in bar of trial, pursuant to article 112.24 of the *Queen's Regulations and Orders for the Canadian Forces*,²⁸ arguing that the order issued by the Chief of the Defence Staff on 2 October 2019, designating the Deputy Vice Chief of the Defence Staff as the commanding officer with respect to disciplinary matters involving a military judge, was unconstitutional as it compromised judicial independence contrary to section 11(d) of the *Charter*. The application was very similar to the one presented before the military judge in *R v Pett*²⁹ and for which the decision had been rendered eleven days earlier.

The military judge substantially followed the reasoning in R v Pett, and dismissed the accused's application. In reviewing the principle of judicial comity, the military judge referred to the Supreme Court of Canada's decision in R v Stillman30 to state that the protection of an accused's fundamental rights cannot be dependent upon the Director of Military Prosecutions' conduct alone.

Also considering another Supreme Court of Canada decision, $R \ v \ Lipp\acute{e},^{31}$ the military judge determined that $R \ v \ Pett$ had been rightly decided and that the Chief of the Defence Staff Order had to be rescinded in order for the accused's rights under section 11(d) of the *Charter* to be protected.

"... the protection of an accused's fundamental rights cannot be dependent on DMP's conduct alone, particularly where the role of DMP is adverse in nature to the interests of an accused person."³²

The military judge went on to comment on the pressing policy reasons for the primacy of the Military Judges Inquiry Committee as a means of disciplining military judges. While generally following the court martial ruling in R v Pett, the military judge further stated that the inapplicability of the Chief of the Defence Staff Order to military judges should be a strong rebuttable presumption rather than a general rule. This preferred method would have the Military Judges Inquiry Committee with primary disciplinary jurisdiction for military judges, followed by civilian criminal courts for matters falling outside the jurisdiction of the Committee, with the military justice system as a last resort. Referring to R v Wehmeier,33 the Military Judge proposed that for matters falling outside the jurisdiction of the Military Judges Inquiry Committee, the onus would rest with the Director of Military Prosecutions to justify before a judge why it is required to bring the matter before a court martial rather than the civilian criminal courts.

Ultimately, the military judge found the Chief of the Defence Staff Order to be of no force or effect as it pertains to military judges—thereby rectifying any violation of the accused's rights under section 11(d)—and dismissed the application for a stay of proceedings.

The trial on the merits was heard on 3 March 2020 but at the end of this reporting period, the court martial had not released its decision in the matter.

²⁷ R v Pett, 2020 CM 4002 at paragraph 110 [Pett].

²⁸ QR&O, supra note 24 at article 112.24.

²⁹ Pett, supra note 27.

³⁰ Stillman, supra note 5.

³¹ R v Lippé, [1991] 2 S.C.R. 114.

³² R v D'Amico, 2020 CM 4002 at paragraph 38.

³³ R v Wehmeier, 2014 CMAC 5.

LEGISLATIVE DEVELOPMENTS

Bill C-77: An Act to amend the National Defence Act and to make related and consequential amendments to other Acts

Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts (Bill C-77), which was at second reading in the Senate at the end of the previous reporting period, received Royal Assent on 21 June 2019.

Bill C-77 strengthens the military justice system and further aligns it with the civilian criminal justice system while respecting the unique requirements of the Canadian Armed Forces. Most significantly, Bill C-77 introduces the *Declaration of Victims Rights* to the Code of Service Discipline, thus enshrining rights for victims of service offences within the military justice system. These rights mirror those found in the *Canadian Victims Bill of Rights*, which received Royal Assent on 23 April 2015, and their introduction aligns the victims' rights available in the military justice system with those available in the civilian criminal justice system.

Bill C-77

Strengthens the military justice system, further aligning it with the civilian criminal justice system while recognizing the unique requirements of the military justice system

Introduces the Declaration of Victims Rights, further strengthening the victims' rights framework within the military justice system

Bill C-77 also adds provisions that mirror the Criminal Code by setting out that evidence that a service offence or service infraction motivated by bias, prejudice, or hate based on gender identity or expression constitutes aggravating circumstances that must be taken into consideration when a sentence or sanction is imposed.34 Moreover, Bill C-77 also requires that particular attention be afforded to the circumstances of Indigenous offenders when considering the appropriate punishments.³⁵ The punishments must be reasonable in the circumstances and consistent with the harm done to victims or to the community. Finally, Bill C-77 reforms the summary trial process into a non-penal, non-criminal summary hearing process designed to address minor breaches of military discipline at the unit level.³⁶ While some of these provisions have already come into force, significant regulatory and policy development is required to bring the majority of the sections into force.

The Military Justice Division of the Office of the Judge Advocate General (Office of the JAG) provided direct legal support for this important legislative initiative throughout the Parliamentary process. Since Bill C-77 received Royal Assent, the Military Justice Division has engaged a variety of different stakeholders with a view to facilitating meaningful consultation in developing the regulations In addition, the Military Justice Division conducted the complex legal and policy analysis in order to assess options with a view to identify the appropriate regulatory and policy instruments required to bring the majority of Bill C-77 into force.

In the next reporting periods the Military Justice Division will continue this challenging work, in conjunction with the myriad of stakeholders and the Department of National Defence and Canadian Forces Legal Adviser's *Queen's Regulations and Orders for the Canadian Forces* Drafting Section, which will lead to the

drafting of the necessary regulations, and the identification and development of policy instruments to bring into force the provisions of Bill C-77.

Reforms the summary trial process into a non-penal, non-criminal summary hearing process

Bill C-77, An Act to amend the National Defence Act ad to make related and consequential amendments to other Acts, 1st Sess, 42nd Parl, Canada, 2019, clause 162.92 (assented to 21 June 2019), S.C. 2019, c 15.

³⁵ *Ibid* at clause 203.3(c.1).

³⁶ *Ibid* at clauses 162.3 – 163.9.

Upon receiving Royal Assent, the following legislative and corresponding regulatory amendments, applicable to both summary trials and courts martial, came into force:

- Evidence that a service offence was motivated by bias, prejudice, or hate based on gender identity or expression constitutes aggravating circumstances that must be taken into consideration when a sentence is imposed
- Particular attention is to be afforded to the circumstances of Indigenous offenders when considering the appropriate punishments. The punishment must be reasonable in the circumstances and consistent with the harm done to victims or to the community, including the Canadian Armed Forces
- A person convicted of certain service offences will not have a criminal record when sentenced to one or more of the following punishments: severe reprimand, reprimand, fine not exceeding basic pay for one month, or minor punishment

The remaining provisions of Bill C-77 will come into force at a later date along with related provisions amending the *Queen's Regulations* and Orders for the Canadian Forces.

Bill C-93: An Act to provide no-cost, expedited record suspensions for simple possession of cannabis

An Act to provide no-cost, expedited record suspensions for simple possession of cannabis, formerly Bill C-93 (Bill C-93), introduced by the Minister of Public Safety and Emergency Preparedness, received Royal Assent on 21 June 2019 and came into force on 1 August 2019.

Bill C-93 has amended the *Criminal Records Act* to allow persons who have been convicted under the *Controlled Drugs and Substances Act*, the *Narcotic Control Act*, or the *National Defence Act* only of simple possession of cannabis offences committed before 17 October 2018 to apply for a record suspension without being subject to the restriction period imposed by the *Criminal Records Act* for other offences or to the fee that is otherwise payable in applying for a suspension.

The Office of the JAG has collaborated with Public Safety Canada in the context of Bill C-93, to ensure that persons convicted of such service offences may apply for a record suspension.³⁷

³⁷ The amendments to the Criminal Records Act will reduce barriers to reintegration for these individuals by allowing them greater access to job opportunities, educational programs, housing, and even the ability to simply volunteer in their communities.

PARLIAMENTARY REVIEW

Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada

On 29 May 2018, the Office of the Auditor General tabled its Report 3-Administration of Justice in

During this reporting period, on 5 April 2019, the official government response⁴⁰ to the report of the Standing Com-mittee on Public Accounts was submitted. The government response acknowledged that the efficient administration of military justice is of critical importance to maintaining discipline, efficiency, and morale in the Canadian Armed Forces and provided the Standing Committee on Public Accounts with updates on the status of the implementation of measures aimed at addressing the recommendations contained in the reports of the Office of the Auditor General of Canada and the Standing Committee on Public Accounts.

The Office of the JAG had fully implemented four of the nine recommendations of each report at the conclusion of the last reporting period, and progress towards the full implementation of the remaining recommendations was made during this reporting period. To this end, the Office of the JAG has launched a number of initiatives further described in Chapter 4.

the Canadian Armed Forces and provided nine recommendations to improve the administration of military justice.³⁸ The Department of National Defence and the Canadian Armed Forces agreed with all nine recommendations and submitted a detailed Management Action Plan outlining the departmental response to address the recommendations. The Office of the Auditor General's report was studied in the fall of 2018 by the Standing Committee on Public Accounts. On 22 October 2019, the Deputy Minister of National Defence and the Judge Advocate General appeared before the Committee to respond to questions and provide evidence. The Committee subsequently released its own report on 6 December 2018 entitled Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada.³⁹ This report echoed and supplemented the findings and conclusions of the Office of the Auditor General's report.

38 Office of the Auditor General of Canada, Report 3 -Administration of Justice in the Canadian Armed Forces, accessible online at: https://www.oag-bvg.gc.ca/internet/English/parl_ oag 201805 03 e 43035.html [OAG Report 3].

Canada, Parliament, House of Commons, Standing Committee on Public Accounts, Government Response to the Fifty-Sixth Report of the Standing Committee on Public Accounts, 42nd Parl, 1st Sess, 5 April 2019, accessible online at: https://www.ourcommons.ca/content/ Committee/421/PACP/GovResponse/RP10404910/421_PACP_ Rpt56_GR/421_PACP_Rpt56_GR-e.pdf.



Canada, Parliament, House of Commons, Standing Committee on Public Accounts, Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, 42nd Parl, 1st Sess, 6 December 2018, accessible online at: https://www.ourcommons.ca/ DocumentViewer/en/42-1/PACP/report-56/.

POLICY INITIATIVES

Support to Victims' Initiatives

Enhancing support to victims and survivors of service offences remains a top priority for the Government of Canada, the Department of National Defence, and the Canadian Armed Forces, as clearly articulated in Canada's Defence Policy - Strong, Secure, Engaged and Operation HONOUR. As outlined in last year's Annual Report, the development of policies providing support to victims and survivors at all stages of the military justice system continued to remain a priority during this reporting period.

As Operation HONOUR remains a top institutional priority for the Canadian Armed Forces, the Office of the JAG remains fully committed to supporting the chain of command in changing the culture of, and eliminating sexual misconduct in, the Canadian Armed Forces. During this reporting period, the Office of the JAG continued to provide legal support to various initiatives aimed at improving the support mechanisms available to victims and survivors of service. This included supporting key stakeholders in their development of important policy instruments aimed at clarifying reporting obligations with respect to sexual misconduct, ensuring that victims' views are considered in determining the appropriate means of handling an instance of sexual misconduct, and that victims of sexual misconduct are properly supported.

- During this reporting period, the Military Justice Division worked in close collaboration with key stakeholders, including the Directorate Professional Military Conduct - Operation HONOUR, the Sexual Misconduct Response Centre, and the Canadian Forces Provost Marshal to assist in the development of policies to enhance support to victims as well as provide guidance to the chain of command to maintain discipline
- In addition, internal and external consultations continued to ensure that victim and survivor support strategies reflect emerging best practices, while remaining tailored to meet the needs of the Canadian Armed Forces. These engagements, as well as work completed towards furthering survivor support initiatives, will continue into the next reporting period

Independent Review of the National Defence Act

In this reporting period, the Judge Advocate General Independent Review Support Team was formed to provide responsive support to the upcoming Third Independent Review, as mandated by section 273.601 of the *National Defence Act*. This provision requires the Minister to cause an independent review of outlined sections in the *National Defence Act* and their operation, which includes the military justice system. A report of these independent reviews is to be tabled every seven year. These reviews typically lead to legislative amendments to ensure the military justice system continues to reflect Canadian values while maintaining discipline, efficiency, and morale.

As per the *National Defence Act*, the independent review will cover matters that touch upon the Code of Service Discipline, the Canadian Forces grievance process, the Military Police Complaints Commission, the Canadian Forces Provost Marshal, and Military Police.⁴¹

The First Independent Review under this provision was completed in 2003. The former Chief Justice of Canada, the late Right Honourable Antonio Lamer, made 88 recommendations and concluded that "... Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence." Most of the recommendations were accepted by the Minister of National Defence and were subsequently addressed by amendments to the National Defence Act in Bill C-60, An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act; Bill C-16, An Act to amend the National Defence Act (military judges); and Bill C-15, the Strengthening Military Justice in the Defence of Canada Act (Bill C-15); respectively.

The Second Independent Review was conducted by the former Chief Justice of the Ontario Superior Court of Justice, the Honourable Patrick LeSage, in 2011. Like his predecessor, he agreed that "... the military justice system is sound, but some modifications will assist in

273.601(1)(a)—(d).

- Mandated by section 273.601 of the National Defence Act
- Causes an independent review of outlined sections in the National Defence Act and their operation, which includes the military justice system
- Report of the independent review to be tabled in Parliament every seven years
- Third Independent Review report expected to be tabled in Parliament in June 2021

ensuring its continued strength and viability."⁴³ Chief Justice LeSage's 55 recommendations are substantially reflected in Bill C-15 regulations which came into force in September 2018, as well as in revised policies.

The next independent review will take place during the next reporting period and it is expected that the report will be tabled in June 2021.

⁴¹ National Defence Act, RSC 1985, c N-5. See paragraphs

⁴² The late, Right Honourable Antonio Lamer, The First Independent Review by the Right Honourable Antonio Lamer, P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Act, as required under section 96 of Statutes of Canada 1998. C.35 at page 1.

⁴³ The Honourable Patrick J. LeSage, Report of the Second Independent Review Authority to the Honourable Peter G. MacKay Minister of National Defence, December 2011 at page 12.

The Military Justice Stakeholders' Forum

The Military Justice Stakeholders' Forum is a regular meeting between independent stakeholders in the military justice system, which serves to enable strategic exchanges and improve communication in areas of common interest. In addition, the Military Justice Stakeholders' Forum facilitates knowledge-sharing and increases awareness of initiatives and best practices in the administration of military justice while respecting the statutorily independent roles of the respective actors. This initiative is in response to a recommendation contained in the Office of the Auditor General of Canada's Report on the Administration of Justice in the Canadian Armed Forces. 44

During this reporting period, the Military Justice Stakeholders' Forum was convened twice, on 12 December 2019 and 7 February 2020. Attendees included the Chief Justice of the Court Martial Appeal Court of Canada, the Judge Advocate General, the Deputy Chief Military Judge, the Director of Military Prosecutions, the Director of Defence Counsel Services, the Canadian Forces Provost Marshal, the Deputy Judge Advocate General (Military Justice), the Executive Director and General Counsel to the Federal Court of Appeal and Court Martial Appeal Court of Canada, the Court Martial Administrator, and Legal Counsel to the Court Martial Administrator.

Meetings of the Military Justice Stakeholders' Forum will continue to be scheduled at regular intervals in order to facilitate the sustained exchange of knowledge, expertise, and best practices amongst key actors in the military justice system.

OTHER DEVELOPMENTS

Appointment of New Director of Defence Counsel Services

Pursuant to section 249.18 of the *National Defence Act*, the Minister of National Defence is responsible for the appointment of an individual to serve as the Director of Defence Counsel Services. The Director of Defence Counsel Services is responsible for providing, supervising, and directing the provision of legal services to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline. During this reporting period, the term of the former Director of Defence Counsel Services, Colonel Delano Fullerton, CD, expired. The Minister of National Defence appointed Colonel Jean-Bruno Cloutier, CD, as the new Director of Defence Counsel Services for a term of four years. His appointment was effective as of 6 March 2020.

⁴⁴ OAG Report 3, supra note 38 at paragraph 3.47.

CONCLUSION

The 2019/20 reporting period is highlighted by a number of notable developments in the military justice system. The landmark decision of the Supreme Court of Canada in R v Stillman strongly affirms the constitutionality, validity, and necessity of a separate system of military justice in Canada. The significant legislative developments outlined in this chapter will considerably enhance support to victims along with improving the promptness, fairness, and effectiveness of the military justice system in modernizing the current summary trial process. These legislative developments notably incorporated sentencing principles similar to that of the civilian criminal justice system in considering gender identity and expression and the unique factors applicable to Indigenous offenders. Finally, it is expected that the Third Independent Review of the military justice system will contribute significantly to the continued evolution of the military justice system.

As a result of the several judicial decisions, legislative initiatives, and policy advancement during the reporting period, the military justice system continues to evolve in light of Canadian law and values while supporting the chain of command to ensure the discipline, efficiency, and morale of the Canadian Armed Forces.





THE SUPERINTENDENCE ENHANCEMENT AND ASSESSMENT PROJECT

OVERVIEW

In the 2015/16 Annual Report, the Judge Advocate General announced the creation of an audit team in order to "develop and pilot a process for... [the collection of] objective and measurable data from a variety of sources and through a variety of mechanisms in order to assess unit level administration of the Code of Service Discipline." In 2017, the Judge Advocate General directed that the superintendence of the administration of the military justice system be enabled in a manner that ensures that the Government of Canada, the Department of National Defence, the Canadian Armed Forces, and Canadians have confidence in the legitimacy, efficiency, and effectiveness of the military justice system, and in its capability to promote discipline, efficiency, and morale in the Canadian Armed Forces.

Based on this mandate, the Superintendence Enhancement and Assessment Project was created within the Military Justice Division, and personnel were assigned to the Superintendence Enhancement and Assessment Team to commence development of a number of initiatives designed to enhance the military justice system.

These important initiatives combine to provide institutional strategic oversight and a pool of objective and measurable data in support of evidence-based decision making. This will serve to enhance the Judge Advocate General's ability to superintend the administration of justice within the Canadian Armed Forces.

Furthermore, each of these projects contributes significantly to the Department of National Defence and the Canadian Armed Forces' response to the 2018 reports of the Office of the Auditor General of Canada and of the House of Commons Standing Committee on Public Accounts with respect to the military justice system, outlined below.

2018 Reports on the Administration of Military Justice

On 29 May 2018, the Office of the Auditor General tabled its *Report 3—Administration of Justice in the Canadian Armed Forces* and provided nine recommendations to improve the administration of military justice.¹ The Office of the Auditor General report was studied in the fall of 2018 by the Standing Committee on Public Accounts, which subsequently released its own report on

Key Initiatives of the Superintendence Enhancement and Assessment Team

- The Justice Administration and Information Management System (JAIMS)
- The Military Justice Stakeholder Engagement Project (MJSEP)
- Military Justice Time Standards (MJTS)
- The Military Justice System Performance Monitoring Framework (MJS-PMF)

Office of the Auditor General of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces, accessible online at: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html.

6 December 2018 entitled Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada.² This report echoed and supplemented the findings and conclusions of the Office of the Auditor General's report. The Department of National Defence and the Canadian Armed Forces agreed with all nine recommendations and submitted a detailed Management Action Plan describing the departmental response to address the recommendations.

A number of important initiatives developed by the Office of the Judge Advocate General (Office of the JAG) form a critical part of that response, with the Superintendence Enhancement and Assessment Team playing a key role. Four of the nine recommendations were fully implemented at the conclusion of the last reporting period. These recommendations focused on: timely disclosure to Canadian Armed Forces members charged with service offences; the continued development of litigation expertise necessary for legal officers in prosecution and defence counsel positions; defining policies for the Director of Military Prosecutions to assign cases and document decisions; and assessing the independence of the Director of Military Prosecutions and the Director of Defence Counsel Services. During this reporting period, the Office of the JAG has made progress towards the full implementation of the remaining recommendations through the launch of the four initiatives described below.3

INITIATIVES

The Justice Administration and Information Management System

BACKGROUND

The Justice Administration and Information Management System (JAIMS) is an innovative electronic case management tool and database designed by the Assistant Deputy Minister (Information Management) with subject matter expert advice from the Office of the JAG, to seamlessly and electronically track military justice files from the reporting of an alleged offence, through to investigation, charge laying, trial disposition, and review in both the summary trial and court martial processes. Front-end users of the system (including investigators, charge layers, presiding officers, review authorities, referral authorities, and legal advisers) input data at each stage of the process thereby allowing the progress of a file to be tracked in real-time.

JAIMS delivers the means to provide commanders at all levels with a user-friendly, real-time workflow tool that will facilitate the administration of military justice at the unit level. It will also support the flow of cases through the system in a timely manner by ensuring that cases proceed in the proper order.

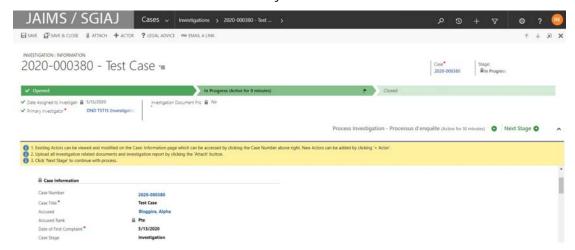
In addition, the system responds, in part, to all five of the Office of the Auditor General's remaining recommendations and forms a critical piece of the Office of the JAG's improvement toward enhanced databased decision making in the superintendence of the administration of military justice.

JAIMS will also compile relevant statistics on the administration of military justice and provide critical data to assist in strategic oversight. In particular, the system will provide a substantial amount of the data required by the Military Justice System Performance Monitoring Framework (described below). This feature is critical to the Department of National Defence and the Canadian Armed Forces' response to the Office of the Auditor General, as it assists the evolution of improved data-based decision making in the superintendence of the administration of military justice. The newly released Military Justice Time Standards (described below) are also being incorporated

² Canada, Parliament, House of Commons, Standing Committee on Public Accounts, Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, 42nd Parl, 1st Sess, 6 December 2018, accessible online at: https://www.ourcommons.ca/ DocumentViewer/en/42-1/PACP/report-56/.

³ See Figure 4-2 at the end of this chapter for a visual summary of the remaining recommendations and corresponding response initiatives.

SCREENSHOT OF THE "INVESTIGATION" INTERFACE IN JAIMS



into JAIMS, ensuring that users are prompted to provide a justification in the event a time standard has not been met. This synergistic approach also aligns with the Department of National Defence's Management Action Plan, in particular, ensuring the definition, communication, tracking, and application of time standards.

LAUNCH

The development of JAIMS' core functionality was completed in 2019, and currently allows users to input, advance, and track non-electable,⁴ summary trial charges. Development of more advanced functionality allowing for accommodation of electable⁵ and court-martial cases is ongoing (discussed below). The system was launched on 27 September 2019 to certain units based in Petawawa. Members of the Superintendence Enhancement and Assessment Team conducted on-site training to facilitate the launch. These units are exercising the real-world capabilities of the system, providing valuable feedback to the developer, and demonstrating the benefits of integrated case management to members of the Canadian Armed Forces.

ONGOING DEVELOPMENT, COVID-19 PANDEMIC, AND OPERATION LASER

The development of the more advanced functionality within JAIMS is ongoing. This advanced functionality will ensure that all types of military justice cases can

be accommodated within the system and will facilitate integration with select other departmental data systems. Due to the COVID-19 pandemic and Operation LASER restrictions, development and the continued rollout has been delayed. Once the pandemic restrictions are eased, development will resume, and the rollout of JAIMS will continue in a measured and responsible manner across the Canadian Armed Forces.

- Innovative electronic case management tool and database designed to seamlessly and electronically track military justice files from beginning to end
- Provides commanders at all levels with a user-friendly, responsible, effective, and efficient real-time workflow tool that will facilitate the administration of military justice at the unit level
- Ensures that cases proceed through the system in a timely manner, prompting key actors to take necessary action at the appropriate time
- Supports the Office of the JAG's improvement towards enhanced data-based decision making in the superintendence of the administration of military justice
- Provides critical data to assist in strategic oversight of the administration of the military justice system

⁴ Non-electable offences include those offences that are enumerated at paragraph 108.17(1) of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O].

⁵ Electable offences include those offences, not captured within the scope of paragraph 108.17(1) of the QR&O, and which are enumerated at paragraphs 108.07(2)&(3) of the QR&O.

The Military Justice Stakeholder Engagement Project

BACKGROUND

The Military Justice Stakeholder Engagement Project consists of a focused online survey designed to collect subjective and qualitative (but also quantifiable and measurable) data from a variety of military justice stakeholders. The online surveys are developed in cooperation with the Director General Military Personnel Research and Analysis, with the objective of connecting with military justice stakeholders in order to better assess the efficiency and effectiveness of the administration of the military justice system and to address any identified issues.

Survey questions range from demographic information (years in the Canadian Armed Forces, current unit and rank, official language, etc.) to length of proceedings, adequacy of training and experience, resources consulted, opinion on legal assistance received, and overall experience within the military justice system. In some cases, respondents are also given the opportunity to provide comments with respect to specific questions.

The Military Justice Stakeholder Engagement Project is part of the Office of the JAG's ongoing commitment to gather and analyze data on the administration of military justice in order to identify and rigorously assess areas for improvement. It also represents one of the current efforts by the Office of the JAG related specifically to recommendation seven of the Office of the Auditor General, to undertake periodic reviews of the administration of the military justice system.

The Military Justice Stakeholder Engagement Project aligns itself with Canada's Defence Policy - Strong, Secure, Engaged, as well as the 2018-2021 Office of the JAG Strategic Direction.⁶ Furthermore, the Military Justice Stakeholder Engagement Project advances the vision of the Department of National Defence and Canadian Armed Forces Data Strategy in that it promotes data being "leveraged in all aspects of Defence programs..." in order to provide "business intelligence and analytics for planning, reporting, and support to decision-making" as well as "to provide foresight and recommendations..."

- Key initiative designed to gather and analyze data on the administration of the military justice system
- Consists of a focused online survey designed to collect subjective and qualitative (but also quantifiable and measurable) data in order to better assess the efficiency and effectiveness of the administration of the military justice system
- Survey questionnaire pays particular attention to respondents' perceived fairness of the summary trial system
- Promotes data being leveraged in all aspects of Defence programs in order to provide business intelligence and analytics for planning, reporting, and support to decision-making

THE 2018-2019 MILITARY JUSTICE STAKEHOLDER ENGAGEMENT PROJECT SURVEY

The 2018-2019 survey focused on military justice at the summary trial level. In order to collect the required data, electronic surveys were sent to all identifiable Canadian Armed Forces members who had participated in the military justice system at the summary trial level during the reporting period of 1 April 2018 to 31 March 2019. Of the 1330 participants, 996 received the email survey request and 436 surveys were completed (a total response rate of 32.7%). Responses were received

^{6 2018-2021} Office of the JAG Strategic Direction – "Excellence Through Service" accessible online at: https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/jag/ojag-strategic-direction-2018-2021-en.pdf.

⁷ Canada, Department of National Defence, *The Department of National Defence and Canadian Armed Forces Data Strategy*, at page 9, accessible online at: https://www.canada.ca/en/department-national-defence/corporate/reports-publications/data-strategy/data-strategy.html.

from 73 Accused members, 92 Assisting Officers, 119 Charge Layers, 110 Presiding Officers, 36 Commanding Officers, and 6 Review Authorities. Each respondent was asked a number of questions, which varied depending on their role in the summary trial system.

The 2018-2019 Stakeholder Survey Results are attached to this report as Annex E. The majority of non-accused respondents believed the summary trial system to be fair. 82% of Assisting Officers, 92% of Charge Layers, 97% of Commanding Officers, 99% of Presiding Officers, and 100% of Review Authorities responded that they believe the military justice system is fair. Their concerns were primarily with regard to the timeliness of proceedings, and the adequacy of training and resources. Conversely, 51% of Accused respondents felt that the system is unfair. Issues were raised with respect to the training and preparedness of Assisting Officers, the timeliness of proceedings, the ability to make full answer and defence, and fairness in sentencing.

FUTURE MILITARY JUSTICE STAKEHOLDER ENGAGEMENT PROJECT SURVEYS

The 2019-2020 Military Justice Stakeholder Engagement Project Survey was planned for release to participants in April 2020. However, given the disruption to regular business activities stemming from the COVID-19 pandemic and the activation of Operation LASER, the survey has been delayed. Upon the resumption of regular business activities, the Superintendence Enhancement and Assessment Team, with the assistance of the Director General Military Personnel Research and Analysis, intends to circulate the survey, compile the data, and prepare the next report.

The data gathered from the 2018-2019 survey will be drawn upon by the Military Justice System Performance Monitoring Framework (outlined below) and will also serve as a baseline for comparison with future Military Justice Stakeholder Engagement Project surveys going forward. As trend directions in the survey data become apparent, the Office of the JAG will be better positioned to identify and address potential issues affecting the military justice system. The Military Justice Stakeholder Engagement Project will continue to assist the Office of the JAG to connect with stakeholders from across the spectrum of the military justice system in order to periodically review the efficiency, effectiveness, and legitimacy of the system, and to make data-driven improvements.



STLM

Military Justice Time Standards

BACKGROUND

In its 2018 Report 3—Administration of Justice in the Canadian Armed Forces, the Office of the Auditor General recommended that "the Canadian Armed Forces should define and communicate time standards for every phase of the military justice process..." A similar recommendation was made by the Standing Committee on Public Accounts in its Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada. The Department of National Defence accepted the recommendation and committed to introducing

• Established on 13 September 2019, the Military Justice Time Standards define and communicate time standards for every phase of the military justice process

- Time standards are being integrated into the Justice Administration and Information Management System
- Users will be required to enter a justification when a time standard is not met
- Will assist in identifying causes of delays within the military justice system
- Promotes efficiency in the administration of the military justice system

"these time standards in a manner that respects rules of fairness and legal requirements."8

In order to implement the recommendation, the Superintendence Enhancement and Assessment Team conducted an internal review of time standards, and engaged in consultations with, notably, the Vice Chief of the Defence Staff, the Canadian Forces Provost Marshal, the Director of Military Prosecutions, the Director of Defence Counsel Services, the Canadian Armed Forces Discipline Advisory Council, and the Court Martial Administrator.

LAUNCH

The new Military Justice Time Standards were communicated through Canadian Forces General Message (CANFORGEN) 023/20, in order to convey their significance to all participants within the military justice system and to publicly fulfill the Department of National Defence and the Canadian Armed Forces' commitment in response to the Office of the Auditor General and the Standing Committee on Public Accounts.

The Military Justice Time Standards are listed in a table attached as Annex G to this report and have been made available online.⁹

The time standards are being incorporated into JAIMS to further facilitate their tracking and application. JAIMS will require decision makers to provide a justification, should they not meet the time standards. This will assist in identifying and resolving the causes of delays in the military justice system. In combination with the other initiatives under the Superintendence Enhancement and Assessment Project, Military Justice Time Standards will help contribute to the discipline, efficiency, and morale of the Canadian Armed Forces.

⁸ Canada, Parliament, House of Commons Standing Committee on Public Accounts, Government Response to the Standing Committee on Public Accounts, Entitled: Report 3, Administration of Military Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, 42nd Parl, 1st Sess, 5 April 2019, at page 4, accessible online at: https://www.ourcommons.ca/content/Committee/421/PACP/GovResponse/RP10404910/421_PACP_Rpt56_GR/421_PACP_Rpt56_GR-e.pdf [Government Response to PACP Report].

⁹ Canada, Department of National Defence, Military Justice Time Standards, accessible online at: https://www.canada.ca/content/ dam/dnd-mdn/documents/legal-juridique/policies-directives/ military-justice-system-time-standards-table-en-20200707.pdf.

Military Justice System Performance Monitoring Framework

BACKGROUND

In order to better support data-based decision making and to improve effective superintendence, the Superintendence Enhancement and Assessment Team have developed a Military Justice System Performance Monitoring Framework. This framework was developed in conjunction with Professor Yvon Dandurand, the leading international expert on performance monitoring and justice system analytics. A report outlining this framework, entitled Military Justice System Performance Monitoring Framework, is attached to this Annual Report as Annex F.

The Military Justice System Performance Monitoring Framework is a robust series of justice indicators which will report objective data on the effectiveness, efficiency, and legitimacy of the military justice system. The indicators will permit the Judge Advocate General, as superintendent of the administration of military justice, to monitor the performance of the military justice system, draw attention to potential issues, assist with the development of benchmarks for future performance, and monitor the impact of changes to the military justice system. The indicators will provide valuable feedback to policy makers and will ultimately make the military justice system more transparent and accountable.

As the Government stated in its response to the 2018 Report of the Office of the Auditor General, this system will report "data on all aspects of the military justice system, enabling an enhanced assessment of the efficiency and effectiveness of the system on an ongoing basis. This will allow for the identification of weaknesses in the system and enable targeted measures to address them. This data-driven effort will transform the government's capacity to strengthen military justice procedures."¹⁰

In developing the Military Justice System Performance Monitoring Framework, the Superintendence Enhancement and Assessment Team consulted with a number of internal and external stakeholders, including the Vice Chief of the Defence Staff, the Canadian Forces Provost Marshal, the Director of Military Prosecutions, the Director of Defence Counsel Services, the Canadian

- Improves the consolidation of information and metrics on the military justice system, in order to better support data-based decision making and effective superintendence
- Consists of a series of justice indicators which will report objective data on the effectiveness, efficiency, and legitimacy of the military justice system
- The indicators will provide valuable feedback to policy makers and will permit the Judge Advocate General to better monitor the performance of the military justice system
- Will contribute to making the military justice system more transparent and accountable
- Promotes data being leveraged in all aspects of Defence programs in order to provide business intelligence and analytics for planning, reporting, and support to decision-making, as well as to provide foresight and recommendations

Armed Forces Discipline Advisory Council, the Court Martial Administrator, and counsel to the Office of the Chief Military Judge.

¹⁰ Government Response to PACP Report, *supra* note 8 at page 7.

THE MILITARY JUSTICE SYSTEM PERFORMANCE MONITORING FRAMEWORK EXPLAINED

The Military Justice System Performance Monitoring Framework ultimately aims to enhance the effectiveness, efficiency, and legitimacy of the military justice system. In order to do so, performance is measured at two levels: 1) the performance of the military justice system as a whole, and 2) the performance of the various components individually and in their contribution to the overall performance of the military justice system.

To accomplish this task, the Military Justice System Performance Monitoring Framework incorporates three types of indicators: 1) **Input Indicators** (measuring workload, activities, and the resources at the disposal of the system); 2) **Output Indicators** (measuring the outputs produced by the system and its various components); and 3) **Outcome Indicators** (measuring performance against the broad objectives of the military justice system). These three indicators encompass 25 currently defined dimensions, which are themselves informed by 54 individual data points (outlined in the attached Annex F).

Each of these indicators acts as an observation post across the military justice system. The data can signal when further analysis may be required. In particular, the framework will illuminate trend directions over time, allowing early intervention where and if necessary. In this way, the Military Justice System Performance Monitoring Framework better equips the Judge Advocate General to effectively and efficiently superintend the administration of the military justice system.

INTEGRATION WITH THE JUSTICE ADMINISTRATION AND INFORMATION MANAGEMENT SYSTEM

The Military Justice System Performance Monitoring Framework indicators are being integrated into JAIMS, which will be the primary source of data and will provide a number of data points for the Military Justice System Performance Monitoring Framework. Remaining data points will be drawn from the Military Justice Stakeholder Engagement Project surveys and certain administrative and financial data.

As the rollout of JAIMS progresses in future reporting periods, the Military Justice System Performance Monitoring Framework will begin to report objective data

Outcomes of judicial reviews

Outcomes of appeals

Access to justice for accused members

Access to justice for victims

Confidence in the military justice system

Perceived fairness of the military justice system

FIGURE 4-1: THE THREE TYPES OF INDICATORS AND RELATED DIMENSIONS

Input Indicators (measuring workload, activities, and the resources at the disposal of the system) Output Indicators (measuring the outputs produced by the system and its various components) Outcome Indicators (measuring performance against the broad objectives of the military justice system) Volume of cases Timeliness of process Outcomes of summary trial reviews

Pre-trial detention

Early resolution of cases

Outcomes of proceedings

Legal assistance provided to accused

Summary trial reviews

Judicial Review

Appeals to Court Martial Appeal Court

Frequency of solving crime

Frequency of military prosecutions

Frequency of civil prosecutions

Frequency of summary trials

DMP preferral rate

Frequency of courts martial

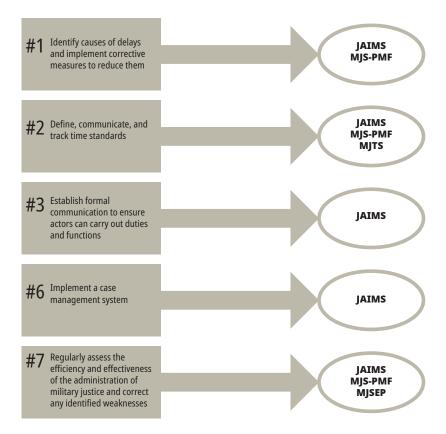
Cost of courts martial

CONCLUSION

This reporting period has seen a number of important milestones within the Superintendence Enhancement and Assessment Project, the Office of the JAG, and the administration of military justice as a whole. The Justice Administration and Information Management System launched on 27 September 2019. The Military Justice Stakeholder Engagement Project completed its first survey and delivered a comprehensive report on its findings. Military Justice Time Standards were defined and communicated to the Canadian Armed Forces, and their integration into the Justice Administration and Information Management System began. The Military Justice System Performance Monitoring Framework was developed in close consultation with an international expert in the field, and will provide critical data on the military justice system.

Individually, each of these initiatives responds to at least one of the recommendations of the Office of the Auditor General and the Standing Committee on Public Accounts. Taken together, these initiatives being delivered as part of the Superintendence Enhancement and Assessment Project support the superintendence of the administration of military justice, and contribute to the discipline, efficiency, and morale of the Canadian Armed Forces.

FIGURE 4-2: SUMMARY OF REMAINING RECOMMENDATIONS AND CORRESPONDING INITIATIVES





THE WAY AHEAD

The Canadian military justice system forms an integral part of Canada's legal mosaic, and the requirement for military tribunals has long been recognized in Canadian law, including in the Constitution. The unambiguous need for a separate system of military justice has been reinforced by Canadian courts on various occasions, and in an unequivocal manner this reporting period in the Supreme Court of Canada's landmark case of *R v Stillman*. Recognized by the Supreme Court of Canada as a parallel and full partner with the civilian criminal justice system, the military justice system significantly contributes to the ability of the Canadian Armed Forces to achieve its mission in Canada and around the world, by assisting military commanders in maintaining discipline, efficiency, and morale.

In support of priorities and objectives of the Government of Canada, the Department of National Defence and the Canadian Armed Forces, the Office of the Judge Advocate General (Office of the JAG) remains dedicated to its strategic directive in delivering "Excellence Through Service" and providing client-focussed, timely, options-oriented, and operationally-driven military legal services. This has remained the guiding objective for the Office of the JAG in the complex and unprecedented operational environment shaped by the COVID-19 pandemic. In order to maintain high responsiveness to the unique requirements of the Canadian Armed Forces, and as the superintendent of the administration of military justice, the Judge Advocate General, supported by the Office of the JAG, remains committed to ensuring the continued responsible evolution of the Canadian military justice system.

The military justice system constantly evolves as a result of jurisprudence, legislative amendments, policy developments, and internal and external reviews. This

reporting period was particularly highlighted by such developments, all of which have contributed to ushering in a "new era" for military justice. The Supreme Court of Canada decision in *R v Stillman* not only confirmed the constitutional legitimacy of the military justice system, but it also emphasized its dynamic nature.² While expressing confidence in the fact that growth and evolution would continue in the future, the Supreme Court of Canada signaled that the Executive and the Legislative branches must ensure that the military justice system's growth is in line with legal and societal developments. Accordingly, the Office of the JAG will continue its important work in the coming reporting periods to ensure that the military justice system continues to meet these expectations.

In R v Stillman,
a majority of the
Supreme Court of Canada
recognized that over the years,
the complexion of the military
justice system has significantly
changed in response to
developments in law,
military life, and society
more broadly.3

¹ R v Stillman, 2019 SCC 40.

² *Ibid* at paragraph 53.

³ *Ibid* at paragraph 36.

The evolution of the military justice system was also highlighted by the enactment of Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts (Bill C-77), through which Parliament confirmed that the purpose of the Code of Service Discipline is to maintain the discipline, efficiency, and morale of the Canadian Armed Forces. The Office of the JAG provided dedicated and continued support towards the Royal Assent of Bill C-77. While certain Bill C-77 legislative amendments came into force upon Royal Assent, many provisions have yet to come into force. Bringing about these important amendments to the National Defence Act will require several years of policy development, consultations, and work with the Department of Justice regulatory drafters. Accordingly, to further enhance the military justice system, the next reporting period will be dedicated to comprehensive consultation with numerous stakeholders with a view to move towards drafting of the voluminous number of regulations required to bring into force the provisions of Bill C-77.

The Office of the JAG is committed to supporting the Canadian Armed Forces in creating an environment free from sexual assault, inappropriate sexual behaviour, racism, discrimination, hateful conduct, and harassment. The military justice system plays a pivotal role in supporting Operation HONOUR and provides a valuable mechanism to aid in the elimination of harmful and inappropriate sexual behaviour which seriously undermines discipline, efficiency, and morale. The Office of the JAG remains committed to supporting the Chief of the Defence Staff and the chain of command in the promotion of a culture of leadership, respect, and honour—the cornerstones of Canada's Defence Policy – *Strong, Secure, Engaged.*

The Judge
Advocate General
and the Office of the JAG
remain committed
to supporting the
Canadian Armed Forces
in the promotion of a
culture of leadership,
respect, and honour.

To that end, efforts are being devoted to ensure enhanced support to victims and survivors of service offences. In the next reporting period, the Office of the JAG will continue providing legal support to various stakeholders' initiatives to develop policy instruments that bolster the victims' support framework within the Canadian Armed Forces.

The Office of the JAG will continue its partnership with the Assistant Deputy Minister (Information Management) and support them in the ongoing development of the Justice Administration and Information Management System by providing subject matter expert advice. This initiative, in addition to the Military Justice System Performance Monitoring Framework, the Military Justice Stakeholder Engagement Project, and Military Justice Time Standards, will continue to significantly improve the ability of the Judge Advocate General to superintend the administration of military justice. These projects provide institutional strategic oversight and have already begun to create a pool of objective and measurable data in support of evidence-based decision making. In addition, these initiatives directly contribute to the Department of National Defence and the Canadian Armed Forces' response to the 2018 reports of the Office of the Auditor General of Canada and the House of Commons Standing Committee on Public Accounts regarding the military justice system.⁴ Although the COVID-19 pandemic has impacted the pace of development, work has, and will, continue on these important projects. Over the next reporting period, while adapting to this operational reality, the Office of the JAG will continue its steadfast work towards the full implementation of these projects. Both individually and collectively, these initiatives will modernize the military justice system, enhance efficiency, effectiveness, and oversight, and will serve as yet another hallmark of the "new era" in Canadian military justice.

⁴ Office of the Auditor General of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces, accessible online at: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html; and Canada, Parliament, House of Commons, Standing Committee on Public Accounts, Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, 42nd Parl, 1st Sess, 6 December 2018, accessible online at: https://www.ourcommons.ca/DocumentViewer/en/42-1/PACP/report-56/.

To maintain high responsiveness to the unique requirements of the Canadian Armed Forces, the Judge Advocate General, supported by the Office of the JAG, is commited to ensuring a steady and responsible evolution of the military justice system.

As noted by the Supreme Court of Canada in the *Stillman* decision, independent reviews also facilitate the responsible evolution of the military justice system. The *National Defence Act* requires the Minister of National Defence to cause periodic independent reviews of the military justice system, and the results of the next review are expected to be tabled before Parliament in June 2021. Independent Reviews are incremental in providing important recommendations to the government in order to ensure that the military justice system continues to evolve in response to legal and societal developments, while promoting the operational effectiveness of the Canadian Armed Forces. As such, the next reporting period will see significant focus on providing responsive support to this external review.



CONCLUSION

This reporting period called for dedicated work towards the improvement and evolution of the military justice system. As a result of landmark jurisprudence, critical legislative amendments, and policy developments, the Canadian Armed Forces have entered a "new era" of military justice with the reinforcement of the principles of efficiency, fairness, operational effectiveness, and constitutional legitimacy. In advancing a multitude of policy and legislative initiatives, legal officers and civilians from the Office of the JAG have demonstrated the highest level of professionalism and expertise. They have upheld the motto of the legal branch, "Let Justice Prevail." While the domestic and international operational environments have become increasingly challenging and complex, the Office of the JAG has been resolute in providing unparalleled legal services to its clients and in ensuring the continued and responsible evolution of the military justice system. Entering the next reporting period under the conditions stemming from the COVID-19 pandemic, the Office of the JAG will ensure it remains fully responsive and flexible in providing legal services under such a challenging, fastpaced, and evolving environment.

Moving into this new decade—and this "new era"—of military justice, it is resoundingly clear that, as with the civilian criminal justice system, the military justice system must remain dynamic and continue to evolve in response to legal and societal developments. Moving forward, the Judge Advocate General, supported by the Office of the JAG, will ensure that the military justice system continues to operate in accordance with the rule of law and remains inextricably linked to promoting discipline, efficiency, and morale within the Canadian Armed Forces. As part of the larger Canadian legal mosaic, the Canadian military justice system will continue to be one that represents Canadian values and in which Canadians can have confidence.

The Code of
Service Discipline
is designed to
meet the required
operational flexibility
and will allow the
military justice system
to continue operating
during these
unique times.



ANNEXES

ANNEX A:

SUMMARY OF CHARGES DISPOSED OF AT SUMMARY TRIAL

1 April 2019 — 31 March 2020 Current as of 2 June 2020

NDA C	on Description		2018-2019		2019-2020	
NDA Section			%	#	%	
83	Disobedience of Lawful Command		0.72	8	1.17	
84	Striking or Offering Violence to a Superior Officer	1	0.12	3	0.44	
85	Insubordinate Behaviour	35	4.19	29	4.25	
86	Quarrels and Disturbances	43	5.14	29	4.25	
90	Absence Without Leave	298	35.65	257	37.68	
93	Cruel or Disgraceful Conduct	1	0.12	4	0.59	
95	Abuse of Subordinates	4	0.48	4	0.59	
97	Drunkenness	121	14.47	75	11	
98	Malingering, Aggravating Disease or Infirmity or Injuring Self or Another	2	0.24	0	0	
101.1	Failure to Comply with Conditions	2	0.24	0	0	
102	Hindering Arrest or Confinement or Withholding Assistance When Called On		0.12	0	0	
107	Wrongful Acts in Relations to Aircraft or Aircraft Material		0.12	1	0.14	
108	Signing Inaccurate Certificate		0.96	0	0	
111	Improper Driving of Vehicles		0.12	0	0	
112	Improper Use of Vehicles	3	0.35	4	0.59	
114	Stealing	2	0.24	4	0.59	
116	Destruction, Damage, Loss or Improper Disposal	2	0.24	4	0.59	
117	Miscellaneous Offences	1	0.12	11	1.61	
125	Wilfully made a false statement in a document	6	0.72	7	1.03	
127	Negligent Handling of Dangerous Substances	3	0.35	1	0.14	
129	Conduct to the prejudice of good order and discipline	287	34.33	240	35.20	
130 (265 CC*)	Assault	1	0.12	0	0	
130 (266 CC)	Assault	4	0.48	0	0	
130 (267CC)	Assault with a Weapon or Causing Bodily Harm	2	0.24	0	0	
130 (430 CC)	Mischief		0	1	0.14	
130 (430(4) CC)	Mischief in Relation to Property		0.12	0	0	
Total		836	100	682	100	

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

^{*} Criminal Code, R.S.C., 1985, c. C-46.

ANNEX B:

SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

1 April 2019 — 31 March 2020 Current as of 2 June 2020

NDA Soation	Description	2018-2019		2019-2020	
NDA Section	Description	#	%	#	%
83	Disobedience of Lawful Command	1	0.89	1	0.76
85	Insubordinate Behaviour	3	2.65	5	3.79
86	Quarrels and Disturbances	1	0.89	4	3.03
87	Resisting or Escaping from Arrest or Custody	1	0.89	0	0.00
90	Absence Without Leave	6	5.30	1	0.76
91	False Statement in Respect of Leave	1	0.89	0	0.00
93	Cruel or Disgraceful Conduct	11	9.73	14	10.61
95	Abuse of Subordinates	8	7.07	6	4.54
97	Drunkenness	8	7.07	5	3.79
101.1	Failure to Comply with Conditions	0	0.00	2	1.51
108	Signing Inaccurate Certificate	0	0.00	2	1.51
109	Low Flying	1	0.89	0	0.00
112	Improper Use of Vehicles	0	0.00	1	0.76
114	Stealing	2	1.76	4	3.03
115	Receiving	0	0.00	2	1.51
116	Destruction, Damage, Loss or Improper Disposal	1	0.89	2	1.51
117 (f)	Miscellaneous Offences	1	0.89	6	4.54
118.1	Failure to Appear or Attend	1	0.89	0	0.00
124	Negligent performance of a military duty	1	0.89	0	0.00
125	Wilfully made a false statement in a document	2	1.76	4	3.03
127	Injurious or destructive handling of dangerous substances	1	0.89	0	0.00
129	Conduct to the prejudice of good order and discipline	38	33.62	50	37.88
130 (4(1) CDSA*)	Possession of a controlled substance	3	2.65	0	0.00
130 (5(1) CDSA)	Trafficking in substance	2	1.77	0	0.00
130 (5(2) CDSA)	Possession for purpose of trafficking	1	0.89	0	0.00
130 (122 CC*)	Breach of trust by public officer	0	0.00	1	0.76
130 (129(a) CC)	Resisting a peace officer	1	0.89	0	0.00
130 (139 CC)	Obstructing justice	0	0.00	1	0.76
130 (162 CC)	Voyeurism	0	0.00	2	1.51
130 (191 CC)	Possession of a device for surreptitious interception of private communication	0	0.00	2	1.51
130 (264(1) CC)	Criminal Harassment	1	0.89	0	0.00
130 (264(1) CC)	Uttering threats	0	0.00	1	0.76
130 (266 CC)	Assault	7	6.19	4	3.03
130 (267CC)	Assault with a Weapon or Causing Bodily Harm	0	0.00	1	0.76
130 (271 CC)	Sexual assault		5.30	4	3.03
130 (334(a) CC)			0.89	0	0.00
130 (348 CC)	Breaking and Entering	1	0.89	0	0.00
130 (351 (1) CC)	Possession of break-in instrument	1	0.89	0	0.00

ANNEX B: SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

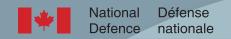
CONTINUATION					
NDA Section Description		2018-2019		2019-2020	
NDA Section	Description	#	%	#	%
130 (354 CC)	Possession of property obtained by crime	0	0.00	3	2.28
130 (355(2) CC)	Trafficking in property obtained by crime	0	0.00	1	0.76
130 (356 CC)	Theft from mail	0	0.00	1	0.76
130 (368(1) CC)	Uttering a forged document	1	0.89	0	0.00
130 (380 CC)	Fraud	0	0.00	1	0.76
130 (430 CC)	Mischief	0	0.00	1	0.76
Total		113	100	132	100

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

^{*} Controlled Drugs and Substances Act, S.C. 1996, c. 19.

^{**} Criminal Code, R.S.C., 1985, c. C-46.

ANNEX C: 2019-2020 DIRECTOR OF MILITARY PROSECUTIONS ANNUAL REPORT



DMP ANNUAL REPORT 2019-2020



Canada





National Defence

Défense nationale

Director of Military Prosecutions

National Defence Headquarters Major-General George R. Pearkes Building 101 Colonel By Drive Ottawa, ON K1A 0K2 Directeur des poursuites militaires

Quartier général de la Défense nationale Édifice Major-général George R. Pearkes 101, promenade du Colonel-By Ottawa (Ontario) K1A 0K2

23 June 2020

Commodore Geneviève Bernatchez, OMM, CD Judge Advocate General National Defence Headquarters 101 Colonel By Drive Ottawa, Ontario K1A 0K2

Commodore Bernatchez,

Pursuant to article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*, I am pleased to present you with the 2019-2020 Annual Report of the Director of Military Prosecutions. The report covers the period from 1 April 2019 to 31 March 2020.

Yours sincerely,

Colonel Bruce MacGregor, CD, Q.C.

Director of Military Prosecutions



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MESSAGE FROM THE DIRECTOR OF MILITARY PROSECUTIONS



I am pleased to present the Director of Military Prosecutions Annual Report for the 2019/20 reporting period, my sixth since being appointed by the Minister of National Defence on 20 October 2014.

As a Commanding Officer, it gives me great pride to lead an organization such as the Canadian Military Prosecution Service and those talented individuals who work within it. Despite this reporting period starting with uncertainty regarding the jurisdiction of the military justice system due to the Court Martial Appeal Court of Canada's decision in *R v Beaudry* in September 2018, our prosecution team pressed forward and made positive strides in ensuring that military justice continued in an open, transparent and principled manner that remains consistent with the *Canadian Charter of Rights and Freedoms*. Canadians, especially those in uniform, should expect no less from their military prosecutors.

On 26 July 2019, the Supreme Court of Canada delivered its decision in *R v Stillman*, 2019 SCC 40. This decision was the latest in a series of decisions by the Supreme Court of Canada which recognize the vital importance of the military justice system as a parallel system of justice which stands side-by-side with the criminal justice system. The Supreme Court of Canada has been resoundingly clear that the military justice system is

necessary for the maintenance of discipline, efficiency and morale of the Canadian Armed Forces, and that the fundamentals of our system are constitutionally sound. No system is perfect – we can and will continue to evolve to meet the expectations of the Canadian Armed Forces and all Canadians. But, I am very proud of the role that our military prosecutors continue to fulfil each and every day within the military justice system.

This past reporting period, I have continued to engage in strategic outreach with members of the Canadian Armed Forces as well as with civilian and military prosecutors both nationally and internationally through the Federal/Provincial/Territorial Heads of Prosecution Committee and the International Association of Prosecutors. These organizations are designed to promote good relations between prosecution agencies and facilitate the exchange and dissemination of information, expertise and experience in those areas that touch upon criminal law and practice management. Through these relationships, not only do we improve the conduct of prosecutions within the Canadian Military Prosecution Service through the sharing of best practices but we also continue to strengthen the legitimacy of Canada's military justice system.

Finally, this year saw further development of and improvement to our electronic case management system.

This system tracks all court martial cases throughout the court martial process, improving transparency and efficiency by increasing accountability and reducing overall delays in the court martial system. In response to the 2018 recommendation by the Auditor General that a case management system be put in place to monitor and manage the progress and completion of military justice cases, the case management system was operationalized on 1 June 2018. The next version of our case management system, which would have been compatible with the Justice Administration and Information Management System, was scheduled to be released at the end of this reporting period. Due to the Canadian Armed Forces' response to the COVID-19 pandemic, this release has been postponed until summer of 2020.

In closing, it has been another very busy and challenging year for the Canadian Military Prosecution Service and I would like to thank my entire team for their dedication, tenacity and professionalism in successfully meeting each and every one of these challenges as we continue to support the rule of law and promote the maintenance of discipline, efficiency and morale of those women and men who proudly serve Canada with distinction, both at home and abroad.

ORDO PER JUSTITIA

Colonel Bruce MacGregor, CD, Q.C. Director of Military Prosecutions





THE CANADIAN MILITARY PROSECUTION SERVICE: ORDO PER JUSTITIA

DUTIES AND FUNCTIONS OF THE DMP

The Director of Military Prosecutions (DMP) is the senior military prosecutor in the Canadian Armed Forces (CAF). He is appointed by the Minister of National Defence (MND) for a fixed term pursuant to subsection 165.1(1) of the National Defence Act (NDA).1 Under the NDA, the DMP is responsible to prefer all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The DMP acts as counsel to the MND, when instructed, in respect of appeals to the Court Martial Appeal Court (CMAC) and the Supreme Court of Canada (SCC). The DMP is also responsible to provide advice in support of investigations conducted by the Canadian Forces National Investigation Service (CFNIS), which is the investigative arm of the Canadian Forces Military Police. The DMP represents the CAF at custody review hearings before military judges and the CMAC.

The DMP operates under the general supervision of the Judge Advocate General (JAG) and, in this regard, the JAG may issue general instructions or guidelines in writing in respect of prosecutions, which the DMP must ensure are made available to the public. The JAG may also issue instructions or guidelines in writing in respect of a particular prosecution. The DMP must ensure that these instructions or guidelines are also available to the public, unless the DMP considers that doing so would not be in the best interest of the administration of military justice.

Appointed for a four-year term, the DMP acts independently from CAF and Department of National Defence (DND) authorities when exercising his prosecutorial powers, duties and functions, and fulfils his mandate in a manner that is fair and impartial. Although the DMP acts under the general supervision of the JAG, he exercises his prosecutorial mandate independently from the JAG and the chain of command. The DMP has a constitutional obligation, like any other public official exercising a prosecutorial function, to act independently of partisan concerns and other improper motives.

In accordance with sections 165.12 and 165.13 of the NDA, when a charge is referred to him, the DMP determines whether to:

- Prefer (or not prefer) the charge;
- Prefer any other charge that is founded on facts disclosed by evidence in addition to or in substitution for the charge; or
- Refer it for disposal by an officer who has jurisdiction to try the accused person by summary trial in those cases where the DMP is satisfied that a charge should not be proceeded with by court martial.

The DMP may also withdraw a charge that has been preferred.

¹ National Defence Act, RSC 1985, c N-5.

MISSION AND VISION

Our Mission

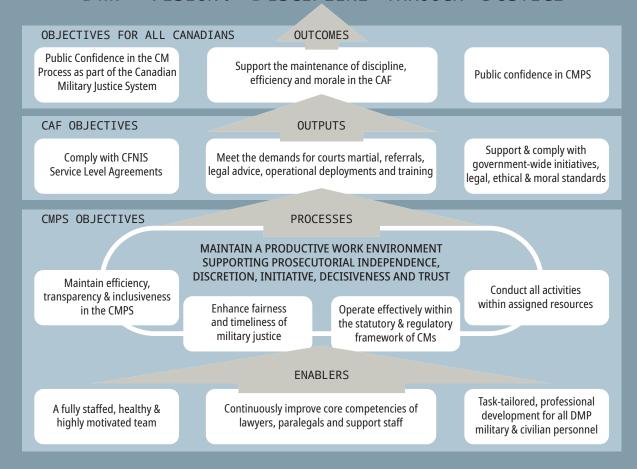
To provide competent, fair, swift and deployable prosecution services to the CAF in Canada and overseas.

Our Vision

"ORDO PER JUSTITIA" or "DISCIPLINE THROUGH JUSTICE". The DMP is a key player in the Canadian military justice system helping to promote respect for the law, as well as discipline, good order, high morale, esprit de corps, group cohesion and operational efficiency and capability.

FIGURE 1-1: DMP VISION: DISCIPLINE THROUGH JUSTICE

DMP Vision: Discipline through Justice



CANADIAN MILITARY PROSECUTION SERVICE

In accordance with section 165.15 of the NDA, the DMP may be assisted and represented, to the extent determined by the DMP, by officers who are barristers or advocates with standing at the bar of a province. In this regard the DMP is assisted by a number of Regular and Reserve Force legal officers appointed to act as military prosecutors, along with a civilian paralegal and support staff. This organization, known as the Canadian Military Prosecution Service (CMPS) is headquartered in Ottawa and comprised of several Regional Military Prosecutor (RMP) offices located across Canada.

CMPS Headquarters

The CMPS Headquarters (HQ) consists of the DMP, the Assistant Director of Military Prosecutions (ADMP), two Deputy Directors of Military Prosecutions (DDMPs), the Appellate Counsel, the Senior Counsel – Policy & Training, and the CFNIS Legal Advisor.

ADMP

The ADMP is responsible to assist the DMP in the day-to-day management of the CMPS. In addition, the ADMP supervises the Appellate Counsel, the Senior Counsel – Policy & Training, and the CFNIS Legal Advisor.

DDMPs

The DDMPs are responsible to supervise and mentor the RMPs. One DDMP currently supervises RMPs located in the Central, Atlantic, and Eastern regions. The other DDMP supervises RMPs located in the Western and Pacific regions.²

Appellate Counsel

The Appellate Counsel prepares and files written materials and appears as counsel on behalf of the MND for all matters at the CMAC and the SCC.³

Senior Counsel - Policy & Training

The Senior Counsel – Policy & Training is a senior military prosecutor who provides advice and support to the DMP on all policy-related matters. They also assist in the coordination of all training opportunities for members of the CMPS, including the organization of an annual Continuing Legal Education workshop.

CFNIS Legal Advisor

The CFNIS Legal Advisor is a military prosecutor embedded with the CFNIS and responsible to provide legal advice to members of the CFNIS HQ. The CFNIS Legal Advisor also provides advice to investigators throughout all stages of an investigation, as well as updates on developments in the criminal law.

Regional Military Prosecutor Offices

Regional offices are located in Halifax, Valcartier, Ottawa, Edmonton and Esquimalt. Each office is comprised of two RMPs and one civilian administrative support staff with the exception of the Esquimalt Office, which only has one RMP. RMPs are responsible for the conduct of courts martial, for representing the CAF at custody review hearings, and for the provision of legal advice and training to their respective CFNIS Detachments.

The DDMP for the Central, Atlantic, and Eastern regions also supervises prosecutions which occur outside of Canada.

³ Depending on the caseload for appeal files, it is common for other officers within the CMPS to also appear as counsel or co-counsel at the CMAC and at the SCC.

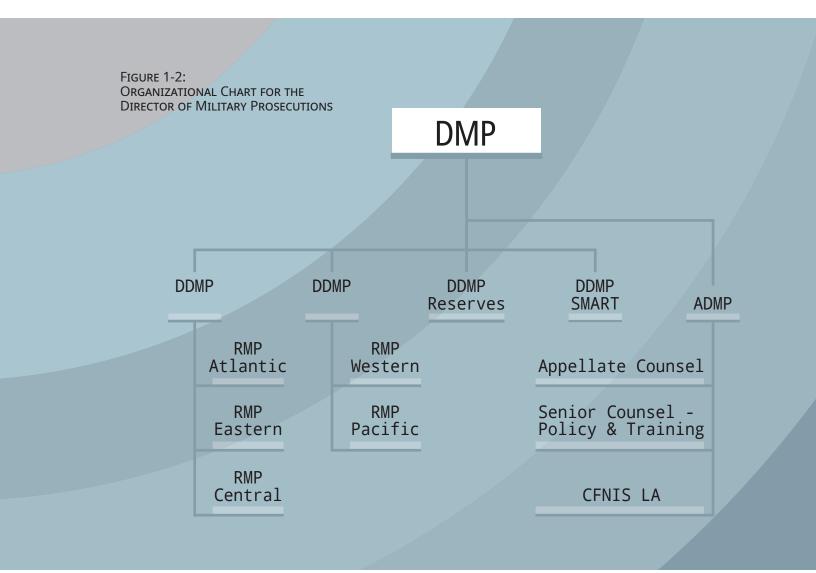
Sexual Misconduct Action Response Team

The DDMP for the Sexual Misconduct Action Response Team (SMART) is primarily responsible for mentoring prosecutors in the performance of their duties related to serious sexual misconduct prosecutions. The DDMP SMART is an experienced Reserve Force prosecutor who holds the rank of Lieutenant-Colonel (LCol).

Reserve Force Prosecutors

The CMPS relies on eight experienced civilian prosecutors who are members of the Reserve Force. These members consist of a DDMP Reserves, at the rank of LCol, who is responsible for the overall supervision and management of Reserve Force prosecutors, the DDMP SMART, and six prosecutors who assist their Regular Force counterparts in the prosecution of cases at courts martial.

The organizational chart for DMP can be found at Figure 1-2.



CMPS PERSONNEL UPDATE

Regular Force

JAG Instruction Regarding Postings of Regular Force members at the CMPS

Recognizing the needs and challenges associated with developing experienced military prosecutors, the JAG issued an instruction to ensure that Regular Force members can remain with the CMPS for a minimum of five years before being considered for a posting. Before this instruction, Regular Force members of the Office of the JAG (OJAG) would normally be considered for a posting outside of the CMPS within three years. This instruction has helped the CMPS in building a pool of experienced RMPs, the benefits of which are beginning to be realized. This reporting period, the JAG renewed her commitment to the five-year minimum posting approach.

Reserve Force

During this reporting period, one civilian assistant Crown attorney from Nova Scotia enrolled in the CAF and joined the CMPS as a Reserve Force prosecutor. One position remains vacant and is expected to be staffed in the next fiscal year.

Civilian Personnel

The CMPS Paralegal position was filled in an acting capacity by another civilian member from the OJAG for a period of four months during the reporting period. In September 2019, a new paralegal was hired into the position.

Additionally, in September 2019, the civilian member who occupied the position of Office Manager/ Administrative Assistant for the Pacific Region office took a year of leave without pay to pursue an employment opportunity with the provincial government. In the meantime, the position is being filled on a part time basis by a former member of the CAF.

TRAINING AND CONTINUING LEGAL EDUCATION

The need to continue to develop legal skills and keep abreast of key developments in the law is important for any lawyer but is critical for all prosecutors. The state of criminal law remains in constant evolution through judicial decisions at the trial and appellate levels, as well as through changes to the *Criminal Code* and the NDA.

The DMP places a premium on training opportunities for members of the CMPS and, aside from a yearly Continuing Legal Education workshop, relies heavily on external organizations to fulfill much of its training requirements. The following sections describe those training opportunities undertaken by members of the CMPS as well as those training activities which were provided by members of the CMPS to other organizations.

CMPS Continuing Legal Education Workshop

The CMPS was scheduled to hold its annual Continuing Legal Education (CLE) workshop at the end of March 2020 for its Regular Force and Reserve Force military prosecutors. Unfortunately, on 12 March 2020, in response to the coronavirus pandemic (COVID-19) and in accordance with CAF directives, the JAG placed a restriction on all temporary duty travel of its members for a period of a least 30 days. This led to the cancellation of the JAG CLE workshop. Similarly, the CMPS postponed its portion of the CLE workshop until the next reporting period.

Civilian Personnel Training Workshop

On 24 and 25 April 2019, the CMPS held a civilian administrative assistant training workshop, which focused on topics such as file management, finance, and training on the functionality of the electronic Case Management System.

Partnership with the Directeur des poursuites criminelles et pénales du Québec

During the last reporting year, the CMPS entered into a partnership with the Directeur des poursuites criminelles et pénales (DPCP) for the temporary employment of an RMP as a Crown prosecutor with the province of Quebec.

One RMP from the Eastern region was seconded to the Quebec City DPCP's Office for a few months. During that time, the RMP acted as second chair for several trials involving sexual violence offences held at the Cour du Québec and the Cour supérieure du Québec. The RMP also followed two in-house courses regarding interaction with media and warrants. Finally, the RMP assisted Crown prosecutors in the conduct of military matters that had been referred to the civilian justice system following the decision of the CMAC in the matter of *R v Beaudry*.⁴ These exchanges are invaluable in fostering relationships with other Canadian prosecution services,

developing well-rounded advocates, and providing an opportunity to capture lessons learned that help further advance our practices and policies.

External organizations

During the reporting period, RMPs participated in continuing legal education programs delivered by a number of organizations including the Federation of Law Societies of Canada, the Public Prosecution Service of Canada, the Ontario Crown Attorneys' Association, le Barreau du Québec, the Osgoode Professional Development, the Professional Development Institute, the Canada School of Public Service and the Alberta Crown Prosecution Service. These programs benefited the CAF not only through the knowledge imparted and skills developed but also through the professional bonds developed by individual RMPs with their colleagues from the provincial and federal prosecution services.

For a complete breakdown of training opportunities provided by external organization, please refer to Table 1-3.

TABLE 1-3: EXTERNAL TRAINING OPPORTUNITIES

Host Organization	Name of Course	Number of Attendees
Federation of Law Societies of Canada	2019 National Criminal Law Program	18
Public Prosecution Service of Canada	PPSC School for Prosecutions - Prosecution Fundamentals (Level 2)	1
Ontario Crown Attorneys' Association	Nuts and Bolts	3
Ontario Crown Attorneys' Association	Appellate Advocacy	1
Ontario Crown Attorneys' Association	Financial Crimes	1
Ontario Crown Attorneys' Association	Trial Advocacy	1
Ontario Crown Attorneys' Association	Search and Seizure	2
Barreau du Québec	Techniques de plaidoirie	1
Osgoode Professional Development	Search Warrant Drafting	1
Alberta Crown Prosecution Service	Indigenous Justice: Cultural Competency Law and Practice	1
Alberta Crown Prosecution Service	Alberta Crown Conference	1
Professional Development Institute	Rule of Law Conference	1
Canada School of Public Service	Change Management Training	1

⁴ R v Beaudry, 2018 CMAC 4 [Beaudry].

Training provided by the CMPS

The CMPS also provides support to the training activities of the OJAG and other CAF entities. During the reporting period, this support included the mentoring and supervision by RMPs of a number of junior legal officers from the OJAG who completed a portion of their "On the job training" program by assisting at courts martial. The CMPS also provided support to military justice briefings given to JAG legal officers and military justice briefings offered by the Regional Services division of the OJAG to other members of the CAF.

Legal officers serving outside the CMPS may also, with the approval of their supervisor and the DMP, participate in courts martial as "second chair" prosecutors. The objective of this program is "to contribute to the professional development of unit legal advisors as well as to improve the quality of prosecutions through greater local situational awareness".⁵

TEMPORARY DUTY

The portability of the court martial system means that courts martial can occur anywhere in Canada or around the world. Unlike their civilian counterparts, RMPs are called upon to travel away from their home for significant periods of time to conduct courts martial and appeals, or to attend training events. Travel away from home – referred to as temporary duty (TD) – has a significant impact on the well-being of CMPS personnel and their families. This year, members of the CMPS were on TD for a total of 806 days. This is an increase of 102 days in comparison to the last reporting period (from 704 to 806). The increase in total number of TD days for this reporting period is mostly due to an increase in court martial-related TD days in comparison to the last reporting period (from 375 to 448).

Table 1-4 shows the breakdown of temporary duty for CMPS personnel by region for this reporting period.

TABLE 1-4: CMPS TEMPORARY DUTY

Region	Court Martial Related TD	Appeal Related TD	Training Related TD	Other TD	Total TD
CMPS HQ	72	25	23	63	183
Atlantic	41	0	22	4	67
Eastern	77	0	19	4	100
Central	143	0	65	1	209
Western	76	0	115	1	192
Pacific	39	0	11	5	55
Total	448	25	255	78	806 ⁶

The DMP and the Deputy Judge Advocate General Regional Services have an agreement whereby unit legal advisors may participate as second chairs to RMPs in preparation for and conduct of courts martial. Please see DMP Policy Directive #: 009/00 (http://www.forces.gc.ca/en/about-policies-standards-legal/comms-with-legal-advisors.page) for further information.

The total number of TD days for this reporting period does not account for TD days spent by four Regular Force prosecutors and one Reserve Force prosecutor while following the Legal Officer Qualification Course (LOQC). The LOQC, which was held from 24 April to 24 May 2019 in Canadian Force Base Kingston, is a necessary training requirement for all legal officers in order to become occupationally qualified and provide legal services as members of the OJAG.



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MILITARY JUSTICE AND THE COURT MARTIAL SYSTEM

INTRODUCTION

The nature of the operational missions entrusted to the CAF requires the maintenance of a high degree of discipline among CAF members. Parliament and the SCC have long recognized the importance of a separate military justice system to govern the conduct of individual soldiers, sailors and air force personnel, and to prescribe punishment for disciplinary breaches. In 1980 and 1992 the SCC in *MacKay v the Queen* and *R v Généreux*, unequivocally upheld the need for military tribunals to exercise their jurisdiction in order to contribute to the maintenance of discipline, and associated military values, as a matter of vital importance to the integrity of the CAF as a national institution.

These principles were unanimously reaffirmed by the SCC in 2015 in *R v Moriarity*: "I conclude that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military." In *Moriarity*, the SCC also reinforced that "... the behavior of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base." 10

These views were directly in line with earlier comments by Chief Justice Lamer in *Généreux* that the Code of Service Discipline (CSD) "does not serve merely to regulate conduct that undermines such discipline and integrity. The CSD serves a public function as well by punishing specific conduct which threatens public order and welfare" and "recourse to the ordinary criminal

courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. In other words, criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale in the CAF. There is thus a need for separate tribunals to enforce special disciplinary standards in the military." ¹¹

Following *Moriarity*, the SCC delivered another unanimous decision related to the military justice system. In 2016, the SCC confirmed in the case of *R v Cawthorne* ¹² that the authority conferred to the MND over appeals was in compliance with the *Canadian Charter of Rights and Freedoms (Charter)*. This decision not only confirmed the organizational structure of the CMPS but also was important for all prosecution services across Canada as the court touched upon the concept of prosecutorial independence and abuse of process. ¹³ This clearly shows that the military justice system is a legitimate and respected parallel justice system within the broader Canadian legal mosaic.

On 26 July 2019, the SCC ruled yet again, in *R v Stillman*, that section 130(1)(a) of the NDA is constitutional finding it consistent with section 11(f) of the *Charter*. ¹⁴ In its decision, the SCC further seized the opportunity to summarize and affirm its prior jurisprudence relating to the military justice system. Amongst other things, the SCC recalled its decision in *Mackay v The Queen* which recognized the constitutionality of section 130(1)(a) as a valid exercise of Parliament's power under section 91(7) of

⁷ MacKay v the Queen, [1980] 2 SCR 370 at paras 48 and 49.

⁸ R v Généreux, [1992] 1 SCR 259 at para 50 [Généreux].

⁹ Rv Moriarity, 2015 SCC 55 at para 46.

¹⁰ Ibid at para 54.

¹¹ Généreux, supra note 2 at 281 and 293.

¹² R v Cawthorne, 2016 SCC 32.

¹³ The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of British Columbia and the Director of Criminal and Penal Prosecutions of Quebec all intervened in this appeal to the SCC.

¹⁴ R v Stillman, 2019 SCC 40 [Stillman].

the *Constitution Act*, 1867.¹⁵ The SCC also reemphasized its decision in *Généreux*, which recognized the uniqueness of the military justice system as an essential mechanism to properly perform the public function of "maintaining discipline and integrity in the Canadian Armed Forces."¹⁶ Finally, the SCC upheld its decision in *Moriarity*, and refused to require a military nexus when charging a service member under section 130(1)(a) other than "the accused's military status."¹⁷ Please refer to Chapter 4 for a detailed discussion of this case.

COURTS MARTIAL

Courts martial are formal military courts presided over by independent military judges. These tribunals are similar in nature to civilian criminal courts and are designed to deal predominantly with offences that are more serious in nature and are conducted in accordance with rules and procedures similar to those followed in civilian criminal courts while maintaining the military character of the proceedings. This chapter provides a basic overview of the court martial system. For further information regarding the court martial process, please refer to Table 2-1.

The court martial system has many features in common with the civilian justice system. For example, the *Charter* applies to both the military justice system as well as the civilian justice system. As such, in both systems of justice, the accused person is presumed innocent until the prosecution has proven his or her guilt beyond a reasonable doubt.

Additionally, courts martial are independent and impartial tribunals whose hearings are open to the public. Before a court martial takes place, it is announced in the Routine Orders of the base where it is to occur and the media is also proactively informed. Once a court martial is completed, the results are communicated publicly through a variety of means including through social media.

Statutorily, pursuant to section 179 of the NDA, courts martial have the same rights, powers and privileges as superior courts of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction", including the attendance, swearing in and examination of witnesses, the production and inspection of documents, and the enforcement of their orders.

There are two types of courts martial provided for under the NDA: General Courts Martial (GCM) and Standing Courts Martial (SCM). A GCM is comprised of a military judge and a panel of five CAF members. The panel is selected randomly by the Court Martial Administrator and is governed by rules that reinforce its military character. At a GCM, the panel serves as the trier of fact while the military judge makes all legal rulings and imposes the sentence. Panels must reach unanimous decisions on the ultimate finding as to whether an accused is guilty beyond a reasonable doubt.

An SCM is conducted by a military judge sitting alone who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

At a court martial, the prosecution is conducted by a legal officer appointed by the DMP. In determining whether to prefer a matter for trial by court martial, RMPs must conduct a two-stage analysis. They must consider whether there is a reasonable prospect of conviction should the matter proceed to trial and whether the public interest requires that a prosecution be pursued. This test is consistent with those applied by Attorneys General throughout Canada and by prosecution agencies elsewhere in the Commonwealth.

What sets the military justice system apart are some of the public interest factors that must be taken into account. These include:

- the likely effect on public confidence in military discipline or the administration of military justice;
- the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence; and
- the effect on the maintenance of good order and discipline in the CAF, including the likely impact, if any, on military operations.

Information relating to these and other public interest factors comes, in part, from the accused's commanding officer when they send the matter to their next superior officer in matters of discipline. That superior officer may also comment on public interest factors when referring the matter to the DMP.

¹⁵ Ibid at paras 4 and 113 citing Mackay v The Queen at 397.

¹⁶ Ibid at paras 35, 36 and 55 citing Généreux at 293, 295, 297.

¹⁷ Ibid at paras 92 and 96.

An accused person tried by court martial is entitled to legal representation by or under the supervision of the Director of Defence Counsel Services. This legal representation is provided to an accused person at no cost. An accused person may also choose to retain a lawyer at their own expense.

In most cases, the accused person has the right to choose between trial by GCM or SCM. However, for the most serious offences a GCM will generally be convened while an SCM will be convened for less serious offences.

Both an offender convicted by court martial and the MND have a right to appeal court martial decisions to the CMAC, a court comprised of civilian judges who are designated

from the Federal Court of Canada and the Federal Court of Appeal, or appointed from the Superior Courts and Courts of Appeal of the provinces and territories.

CMAC decisions may be appealed to the SCC on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the SCC.

TABLE 2-1: ADDITIONAL FACTS ABOUT THE COURT MARTIAL SYSTEM

Торіс	Remarks
Purpose of the Military Justice System	The purpose of the military justice system is to contribute to the operational effectiveness of the CAF by maintaining discipline, efficiency and morale.
Jurisdiction of the Military Justice System	Courts martial only have jurisdiction over those persons who are subject to the CSD. When a person joins the CAF, they remain subject to all Canadian laws but also become subject to the CSD. Therefore, members of the CAF are subject to the concurrent jurisdiction of both the civilian and the military justice system.
Requirement for Pre-charge Legal Advice	In the majority of cases, the person authorized to lay a charge in the military justice system must first obtain pre-charge legal advice concerning the sufficiency of the evidence, whether or not a charge should be laid and the appropriate charge.
	Military prosecutors provide pre-charge legal advice to all cases investigated by the CFNIS. In some cases, military prosecutors will also assist legal officers with the Office of the Judge Advocate General by providing pre-charge legal advice in cases investigated by those members of the military police who are not a part of the CFNIS as well as by unit investigators.
Custody Review Process	If a person is arrested under the CSD they may be released by the person making the arrest or by a custody review officer. If the individual is not released the matter will go before a military judge to determine if the individual is to be released, with or without conditions, or if they are to remain in custody. Military prosecutors represent the CAF at all custody review hearings which are held before a military judge.
Disclosure Obligations	Accused persons in the military justice system have the constitutional right to make full answer and defence. Therefore, military prosecutors must disclose all relevant information to the accused, including both inculpatory and exculpatory, whether or not the prosecution intends to introduce it into evidence.
Sentencing	Under the NDA, military judges have a wide variety of sentencing options available for those members found guilty at court martial. Aside from fines and periods of imprisonment which are also available in the civilian justice system, military judges are able to sentence offenders to dismissal with disgrace, dismissal, reprimands, detention, reduction in rank and minor punishments. In addition, new provisions added to the NDA effective 1 September 2018 allow military judges to grant absolute discharges, an order that the offender serve his or her sentence intermittently as well as an order to suspend the execution of any sentences of imprisonment or detention.



COURT MARTIAL PROCEEDINGS: YEAR IN REVIEW



The information and analysis provided below reflects the operations of the CMPS pertaining to pre-charge advice, referrals, post-charge reviews, courts martial, and custody review hearings over the course of the reporting period.

OVERVIEW

The CMPS's total court martial caseload for the reporting period consisted of 130 files: 76 referrals were received during the reporting period and 54 files were carried over from the previous reporting period.

In addition, the CMPS handled 134 requests for precharge advice, 11 appeals to the CMAC and two (2) appeals to the SCC, for a total of 277 files over the course of the current reporting period (pre-charge, referral and appeal files combined).

Military judges are, in certain circumstances, required to review orders made to retain a CAF member in service custody. The DMP represents the CAF at all such hearings. No pre-trial custody review hearings were conducted during this reporting period.

Finally, a total of 55 courts martial were completed. Three (3) of those were new trials following appeals and orders made by the CMAC for the conduct of new courts martial: *R v Cpl Cadieux*, *R v Capt Bannister*, and *R v Cpl Thibault*.

CORONAVIRUS (COVID-19) PANDEMIC

On 12 March 2020, in response to the COVID-19 pandemic and in accordance with CAF directives, the JAG imposed a restriction on all temporary duty travel for members of the OJAG. This led to the cancellation of the JAG CLE workshop. Similarly, the CMPS postponed its portion of the CLE workshop until the next reporting period.

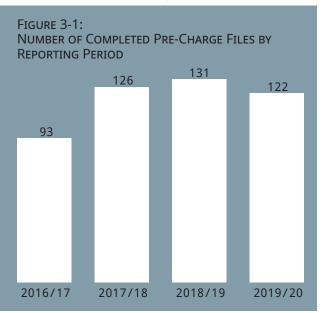
With respect to courts martial, the Court Martial Administrator, acting on direction from the CMJ, canceled convening orders for courts martial that were scheduled to start in the month of March 2020 or in the months following the start of the next reporting period. A total of two (2) courts martial (*R v P02 Breadner* and *R v Bdr Ferguson*) were convened to start before the end of this reporting period, but were canceled by reason of COVID-19. In addition, in the case of two (2) courts martial (*R v Maj Duquette* and *R v Cpl Thibault*), trials were completed and findings were made by the presiding military judge, but sentencing hearings were postponed to the next reporting period because of COVID-19. The latter cases are accounted for in the total number of courts martial completed for this reporting period.

PRE-CHARGE ADVICE

RMPs within the CMPS are responsible to provide precharge advice to both the CFNIS¹⁸ and to unit legal advisors.¹⁹ In this reporting period, 129 requests for pre-charge advice were sent to the CMPS and five (5) requests had been pending from the previous reporting period. Of the 134 total requests, 122 pre-charge advice files were completed during this reporting period, leaving 12 files still pending at the end of the current reporting period.

The number of completed pre-charge advice files is consistent with the average number of completed files over the past three reporting periods.

Figure 3-1 shows the number of completed pre-charge files for the last four reporting periods.



REFERRALS AND POST-CHARGE REVIEWS

Number of Referrals Received During the Reporting Period

During this reporting period, 76 referrals were received by the DMP. This is a decrease of 26 referrals in comparison to the last reporting period (from 102 to 76). The yearly average for the last five reporting periods is 104.

The 76 referrals represents the lowest number of referrals received over the last five reporting periods. This decrease is explained by the impact of the CMAC decision in Beaudry and the subsequent ruling of the SCC, on 14 January 2019, to dismiss the DMP's request for a stay of execution of the CMAC decision in *Beaudry*. This meant that persons accused of criminal offences committed in Canada for which the maximum sentence was five years imprisonment or more could not be tried within the military justice system. Immediately following the SCC's ruling on the request for a stay of execution, the DMP communicated the decision to the highest levels of the chain of command within the CAF and set out his intentions as to how to proceed with those cases which were impacted by the CMAC decision in Beaudry. Consequently, from 19 September 2018 to 26 July 2019, many files involving "offences committed in Canada for which a maximum sentence is five years imprisonment or more" could not be referred to the DMP for lack of jurisdiction. For a detailed discussion of the impact of the CMAC decision in Beaudry and the SCC decision in Stillman, please refer to Chapter 4.

¹⁸ DMP Policy Directive 002/99: Pre-Charge Screening https://www.canada.ca/en/department-national-defence/ corporate/policies-standards/legal-policies-directives/pre-chargescreening.html

¹⁹ JAG Policy Directive 048/18 – Pre-Charge Screening requires unit legal advisors to seek the opinion of a prosecutor for precharge advice when the evidence reasonably supports the conclusion that a charge will not proceed by way of summary trial but is likely to be referred for trial by court martial.

Caseload for the Reporting Period

When combined with the 54 files that were carried over from the previous reporting period, the caseload for this reporting period was 130 files.²⁰

Figure 3-2 shows the number of files handled for the past five reporting periods.

Preferrals and Non-Preferrals

During this reporting period, post-charge decisions were made by an RMP in 87 files, while seven (7) files were still pending a prosecutorial decision at the end of the current reporting period.

Of the 87 completed files, 56 files led to one or more charges being preferred for court martial and 31 files were not preferred. The preferral rate for this reporting period is 64%, which is consistent with the average preferral rate for the past five reporting periods (64%).

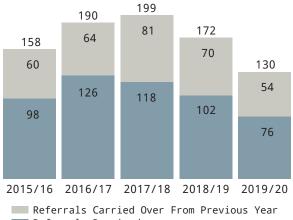
Figure 3-3 shows the number of preferrals and nonpreferrals for the past five reporting periods.

Time to Make a Prosecutorial Decision

The average number of days from the time a file was referred to the DMP until a RMP made the post-charge decision was approximately 70 days.21 This represents a decrease of 18 days from the previous reporting period. It is also significantly below the average number of days for the past five reporting periods, which is 82 days.

Figure 3-4 illustrates the average number of days from referral to a post-charge decision for the past five reporting periods.

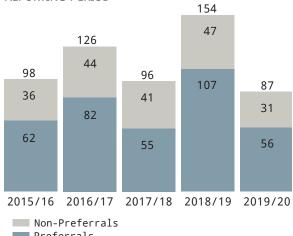
FIGURE 3-2: CASELOAD BY REPORTING PERIOD



Referrals Received

Preferral Rates by

FIGURE 3-3: NUMBER OF PREFERRALS AND NON-PREFERRALS BY REPORTING PERIOD



Preferrals

FIGURE 3-4: AVERAGE NUMBER OF DAYS FROM REFERRAL TO POST-CHARGE DECISION BY REPORTING PERIOD



Carried over files are files that were not closed at the end of the previous reporting period, that is, files where one or more charge had already been preferred, but the court martial has not yet commenced, and files that still required a post-charge decision by the end of the previous reporting period.

This statistic accounts only for cases where a post-charge decision was made during the current reporting period.

Investigative Agency

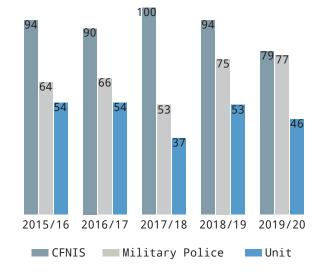
Although all files referred to the DMP are received through a referral authority, the incident giving rise to the charge may be investigated by one of three military investigative agencies: the CFNIS, an investigator with the military police who is not a member of the CFNIS, or a unit investigator. As such, the rate of preferrals varies between investigative agencies as their investigators have different levels of experience, proficiency and training.

During this reporting period, the preferral rate for those files investigated by the CFNIS was 79%.²² This preferral rate is slightly higher than that of the regular military police (77%), but is markedly higher than that of unit investigators (46%).

This divergence of preferral rates has been consistent over the past several years, with those investigations conducted by the CFNIS being preferred at a higher rate than regular military police and unit investigators. For a complete overview of preferral rates by investigative agency over the past five reporting periods, please refer to Figure 3-5.

The DMP has identified the discrepancy in preferral rates, and in particular the low preferral rate of unit investigations, as an issue and has taken a number of steps to improve the preferral rates of investigative agencies. For example, in the past reporting period, the CMPS amended a number of its policy directives to require RMPs to provide feedback to the investigator both when there is a decision not to prefer a charge and also at the conclusion of a court martial, with the aim of improving the quality of future investigations. The DMP also provided a RMP to attend and assist with the pilot serial of the Canadian Forces Military Police Academy Investigators Course, conducted in Borden in October and November 2019.

FIGURE 3-5:
PREFERRAL RATES BY INVESTIGATIVE AGENCY AND BY
REPORTING PERIOD



²² This figure does not include those cases which were investigated by the CFNIS but were non-preferred as a result of the CMAC decision in *Beaudry*. The lower preferral rate for the CFNIS this reporting period is skewed by a lower number of referrals overall. This rate is the result of 4 of 19 referrals from CFNIS investigations not being preferred. The DMP does not view the drop in preferral rate for the CFNIS to be statistically relevant.

COURTS MARTIAL

This section provides an overview and analysis of cases heard at a court martial during the reporting period. For a complete list of all courts martial heard during the reporting period, please refer to Annex A.

Number of Courts Martial

A total of 55 courts martial were completed during this reporting period.²³ Of those, 45 were SCMs and 10 were GCMs. This is consistent with the historical average of courts martial for the past five years (54). In this reporting period, there was a slight increase in the number of GCMs in comparison to the average number of GCMs for the past five reporting periods (6). A complete picture of the number of courts martial for the last five reporting periods, by type, can be found at Figure 3-6.

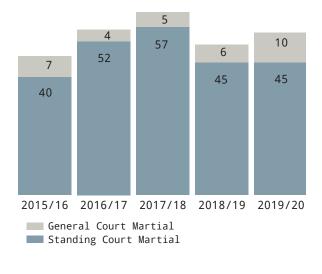
Court Martial Outcomes

Of the 55 courts martial that were held, accused persons were found guilty of one or more charges in 44 cases, found not guilty of all charges in seven (7) cases, had all charges withdrawn in three (3) cases, and had a termination of proceedings in one (1) case.

In addition, three (3) of the 55 courts martial were new trials following appeals and orders made by the CMAC for the conduct of a new court martial: *R v Cpl Cadieux*, *R v Capt Bannister*, and *R v Cpl Thibault*. For each of those three cases, a finding of guilty on at least one charge was obtained at the completion of the new trial.

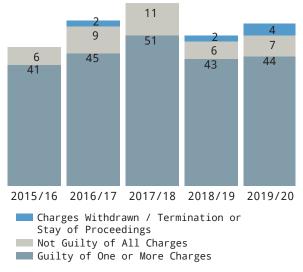
Figure 3-7 shows a breakdown of court martial outcomes for the last five reporting periods.

FIGURE 3-6: NUMBER OF COURTS MARTIAL BY TYPE AND BY REPORTING PERIOD



²³ In two courts martial (R v Maj Duquette and R v Cpl Thibault), trials were completed and findings were made by the presiding military judge, but sentencing hearings were postponed to the next reporting period because of COVID-19. These cases are accounted for in the total number of courts martial completed for this reporting period.

FIGURE 3-7: COURTS MARTIAL OUTCOMES BY REPORTING PERIOD



Punishments at Courts Martial

In this reporting period, a total of 42 sentences were handed down by courts martial, involving a total of 63 punishments.²⁴ While only one sentence may be given at a court martial, a sentence may involve a combination of more than one punishment.

Again this year, the most common punishment awarded at courts martial was a fine, with a total of 32 fines awarded representing 51% of all punishments. The next most common punishment awarded was a severe reprimand, which accounted for approximately 24% of all punishments. Three (3) custodial punishments were awarded; two of which were suspended by the presiding military judge.

A complete breakdown of all punishments imposed at courts martial for the last five reporting periods can be found in Table 3-1.

TABLE 3-1: PUNISHMENTS AT COURT MARTIAL

Punishment	2015/16	2016/17	2017/18	2018/19	2019/20
Dismissal	2	1	3	2	1
Imprisonment	3	4	7	3	2****
Detention	4	4*	4**	1***	1****
Reduction in Rank	3	9	9	2	3
Forfeiture of Seniority	0	0	0	0	1
Severe Reprimand	10	6	11	9	15
Reprimand	13	17	20	4	6
Fine	32	39	38	35	32
Minor Punishment	0	0	3	0	0
Absolute Discharge*****	N/A	N/A	N/A	0	2
Total	67	80	95	56	63

^{*} One of these punishments was suspended by the presiding military judge.

^{**} Three of these punishments were suspended by the presiding military judge.

^{***} This punishment was suspended by the presiding military judge.

One of these punishments was suspended by the presiding military judge.

^{*****} This punishment was suspended by the presiding military judge.

^{******}Absolute discharges became available to presiding military judges as of 1 September 2018 under section 203.8 of the NDA.

²⁴ In the case of two courts martial (*R v Maj Duquette* and *R v Cpl Thibault*), trials were completed and findings were made by the presiding military judge, but sentencing hearings were postponed to the next reporting period because of COVID-19.

Time from Preferral of Charge(s) until Commencement of Court Martial

During this reporting period, the average number of days from the preferral of charge(s) until the commencement of the court martial was 278 days. ²⁵ This is an increase of 34 days in comparison to the previous reporting period and is 46 days above the past five year average of 202 days. This increase was due to the CMAC decision in *Beaudry*, as a number of cases already proceeding in the military system could not be heard until jurisdiction over the offences had been restored. Figure 3-8 shows the average number of days from the preferral of charges until the commencement of the court martial for the last five reporting periods.

Offence Categories

All files prosecuted by the DMP are categorized into one of four broad offence categories: sexual misconduct, alcohol and drugs, conduct offences and fraud and other property-related offences. Table 3-2 provides an overview of the number of completed courts martial for each offence category.

FIGURE 3-8:
AVERAGE NUMBER OF DAYS FROM PREFERRAL TO
COMMENCEMENT OF COURT MARTIAL BY REPORTING
PERIOD

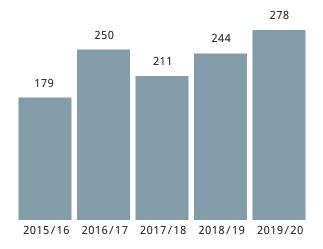


TABLE 3-2: COURTS MARTIAL BY OFFENCE CATEGORY

Offence Category	Completed Courts Martial 2016-17	Completed Courts Martial 2017-18	Completed Courts Martial 2018-19	Completed Courts Martial 2019-20
Sexual Misconduct	21	20	20	25
Alcohol and Drugs	7	2	5	1
Conduct	21	34	21	20
Fraud and Property	8	6	5	9
Total	57 ²⁶	62	51	55 ²⁷

²⁵ This statistic only includes cases where the court martial actually commenced during this reporting period, even if the preferral of charge(s) was completed during previous reporting periods. Two courts martial (*R v PO2 Breadner* and *R v Bdr Ferguson*) were convened to commence during this reporting period, but were canceled by reason of COVID-19. These cases are not included in this statistic.

²⁶ A discrepancy was noted in the DMP Annual Report 2016-17. Figure 21 indicates that 56 courts martial were completed in 2016-17. However, the number of completed courts martial by offence category found at Figure 27 amounts to 57 completed courts martial. The latter number was used in Table 3-2 for uniformity purposes.

²⁷ In the case of two courts martial (*R v Maj Duquette* and *R v Cpl Thibault*), trials were completed and findings were made by the presiding military judge, but sentencing hearings were postponed to the next reporting period because of COVID-19.

NOTABLE COURT MARTIAL CASES

This section provides a summary of three notable courts martial that were held during this reporting period.

R v Dutil, 2019 CM 3003

Col Dutil, the then-Chief Military Judge (CMJ), was charged by a Special Prosecutor appointed pursuant to the DMP Policy Directive #016/17 – Appointment of Special Prosecutors. At the beginning of his SCM, which was convened on 10 June 2019, Col Dutil was facing four charges (one count of willfully making false statements contrary to s. 125(a) NDA, one count of fraud contrary to s. 380 of the Criminal Code under s. 130 NDA, one count of an act of fraudulent nature contrary s. 117(f) NDA, and one count of conduct to the prejudice of good order and discipline contrary to s. 129 NDA).

At the opening of his trial, Col Dutil made an objection to the constitution of the court martial and requested the recusal of the presiding military judge on the ground of partiality. On 17 June 2019, the presiding military judge recused himself and, as Deputy CMJ, read a letter where he stated his refusal to assign any of the three other eligible military judges ('the non-assignment decision'). The court martial proceedings were adjourned indefinitely.²⁸

The DMP applied to the Federal Court for judicial review seeking a writ of *mandamus* to force the Deputy CMJ, under s. 165.25 NDA, to appoint a replacement and alternatively took the position that the decision was unreasonable. On 3 March 2020, the Federal Court dismissed the application for judicial review, finding that the decision was reasonable and stating that the conditions required to issue a writ of *mandamus* had not been met.²⁹ The Federal Court further noted that, apart from amending the NDA, the assignment of an *ad hoc* judge from a superior court would constitute the best alternative to address the issue.³⁰

On 13 March 2020, DMP made the decision to withdraw all charges in this case.

R v Cadieux, 2019 CM 2011

Cpl Cadieux was originally charged with one count of an offence contrary to s. 130 NDA, that is, sexual assault contrary to s. 271 of the *Criminal Code*, and one count of drunkenness contrary to s. 97 NDA. This court martial was a new trial following an appeal from the acquittals of Cpl Cadieux at his SCM on 12 May 2017. In a unanimous decision rendered on 10 September 2018, the CMAC granted the appeal, quashed the acquittals and ordered a new trial.³¹

At the conclusion of the new trial the presiding military judge found that the victim was incapable of consenting to the sexual activity of kissing. As for the *mens rea*, the Court found that the defence of honest but mistaken belief was not available to Cpl Cadieux under s. 273.2 of the *Criminal Code* as it was vitiated by his recklessness, willful blindness and his failure to take reasonable steps. On drunkenness, the presiding military judge accepted that Cpl Cadieux's actions were "owing to alcohol", finding that the simple act of getting into the driver's seat of a car, with the keys inside the vehicle, while under the influence of alcohol or a drug is normally sufficient to attract jeopardy in a criminal context and that it meets the disorderly test of the offence of drunkenness.³²

On 22 May 2019, Cpl Cadieux was convicted on both charges. He was sentenced to detention for a period of 60 days and a severe reprimand. The punishment of detention was suspended.

R v D'Amico (citation not yet available)

Cpl D'Amico was charged with neglect to the prejudice of good order and discipline contrary to s. 129 NDA. On 2 October 2019, the CDS issued an order in the form of a letter designating the Deputy Vice Chief of the Defence Staff (DVCDS) as the Commanding Officer (CO) with respect to disciplinary matters involving military judges. Cpl D'Amico brought an application for plea in bar of trial under QR&O 112.24, alleging a breach of his right to a fair and public hearing by an independent and impartial tribunal under s. 11(d) of the *Charter* and seeking a stay of proceedings. The same application was first made in the matter of *R v Pett.*³³

²⁸ R c Dutil, 2019 CM 3003.

²⁹ Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge), 2020 FC 330.

³⁰ *Ibid* at para 182.

³¹ R v Cadieux, 2018 CMAC 3.

³² *Ibid.* at para 216.

³³ See the case summary for R v Pett, CMAC-603 in the section of "Appeals Initiated at the CMAC".

The presiding military judge found that the CDS order undermined the necessary guarantees of judicial impartiality and that military judges cannot be tried for service offences while holding office, thus the CDS order infringed the rights of Cpl D'Amico protected under s. 11(d) of the *Charter*. However, she declined to stay the proceedings. On 9 March 2020, Cpl D'Amico was found guilty by a panel at a GCM and received an absolute discharge as a sentence.

APPEALS

This section provides an overview of those cases which were appealed to the CMAC as well as to the SCC. Please refer to Annex B for an overview of the disposition of cases appealed to the CMAC and to Annex C for those cases referred to the SCC.

Decisions Rendered by the CMAC

R v Bannister, 2019 CMAC 2

Capt Bannister was acquitted of six charges (three counts of disgraceful conduct and three alternate counts of conduct to the prejudice of good order and discipline) at an SCM on 27 February 2018.

The DMP appealed, arguing that the military judge applied a test that is too restrictive, that he failed to consider the risk of harm demonstrated by the evidence, that he erred by conflating the concepts of inferential reasoning and the taking of judicial notice and that he erred in requiring evidence of actual harm to good order and discipline.

The CMAC granted the appeal, quashed the acquittals and ordered a new trial on all charges before a different military judge. The CMAC decided that whether something is disgraceful or prejudicial to good order and discipline shall be analyzed through an objective standard, taking into account the totality of the context in which it occurred and on the basis of the trier of facts' own military experience and general service knowledge. The Court further held that actual harm is not required for proving prejudice to good order and discipline. Conduct that tends to or is likely to cause harm is sufficient.

R v MacIntyre, 2019 CMAC 3

On 27 June 2018, a GCM held in Halifax, Nova Scotia, found Sgt MacIntyre not guilty of one charge of sexual assault. On 26 July 2018, the DMP appealed this case to the CMAC on two grounds: 1) that the military judge erred in law in instructing the panel that they needed to find that the accused knew that the complainant was not consenting despite his previous ruling that the defence of honest but mistaken belief in consent did not apply; and, 2) the military judge erred in law in instructing the panel that they could find the accused not guilty of the offence charged, if they found that the police investigation was inadequate.

The CMAC dismissed the appeal and found that "knowledge, wilful blindness, or recklessness as to the complainant's lack of consent is an essential *mens rea* element of sexual assault and it is not an error of law to simply instruct the trier of fact on the element of knowledge of lack of consent."³⁴ The CMAC also dismissed the second ground of appeal, finding no error in the military judge's comments regarding the investigation. Leave to appeal to the SCC was denied.

R v Edwards, 2019 CMAC 4

On 16 November 2018, a SCM held in Halifax, Nova Scotia, found LS Edwards not guilty of one charge of prejudice to good order and discipline. The offence alleged that the accused used cocaine, contrary to QR&O 20.04, between 25 September 2015 and 23 July 2016, at or near Halifax, Nova Scotia.

On 11 December 2018, the DMP appealed this case to the CMAC on two grounds: 1) that the military judge erred in requiring specific evidence on elements and matters that were immaterial to the proof of the offence (time and place); and, 2) the military judge erred in his assessment of the confession by analysing the evidence through a piecemeal approach and failing to consider the evidence as a whole.

The CMAC confirmed that "from time immemorial, a date specified in an indictment or information has not been held to be a material matter" and that "courts martial are clothed with unlimited territorial jurisdiction, which extends throughout Canada and the world, but for those alleged offences arising in Canada referred to

³⁴ R v MacIntyre, 2019 CMAC 3 at para 69.

³⁵ R v Edwards, 2019 CMAC 4 at para 12.

in s. 70 of the *NDA*."³⁶ The CMAC did not consider the second ground of appeal as it was satisfied that the first ground of appeal was determinative of the matter. A new trial was ordered before a different military judge.

R v Banting, 2019 CMAC 5

On 4 April 2019, Lt Banting was pronounced not guilty of one charge pursuant to s. 129 NDA for having used inappropriate sexualized language while lecturing military candidates on combat first aid at the Canadian Special Operations Training Centre. The military judge found that no *prima facie* case had been made out by the prosecution.

On 29 April 2019, the DMP appealed on the ground that the military judge erred in law in her determination that no *prima facie* case had been made out in respect of the charge by finding that there was no evidence of prejudice upon which a properly instructed panel could reasonably convict the accused. In a unanimous decision directly from the bench, the CMAC held that the military judge was correct in her finding that there was no evidence of prejudice to good order and discipline.

At the end of the reporting period, a motion for costs by the Respondent was before the CMAC.³⁷

R v Darrigan, 2020 CMAC 1

At his SCM held in Halifax, Nova Scotia from 14-16 May 2019, Petty Officer 2nd Class (PO2) Darrigan pleaded guilty to one count of stealing when entrusted contrary to s. 114 NDA and to one count of selling the items improperly contrary to s. 116(a) NDA. He was sentenced by the presiding military judge to a severe reprimand, a fine in the amount of \$8,000 and an order for restitution for \$750.

The DMP appealed this case, arguing that the military judge erred in applying the sentencing principles of proportionality and parity, in over-emphasizing the mitigating factors and in imposing a sentence that was demonstrably unfit as stealing from an employer should attract a custodial sentence in the absence of exceptional factors.

The CMAC dismissed the appeal and upheld the sentence imposed by the military judge, as it was of

Appeals Initiated at the CMAC

R v McGregor, CMAC-602

Following an SCM, Cpl McGregor was found guilty of an offence under s. 130 NDA, that is, sexual assault, contrary to s. 271 of the *Criminal Code*; two counts under s. 130 NDA, that is, voyeurism, contrary to s. 162(1) of the *Criminal Code*; an offence under s. 130 NDA, that is, possession of a device for surreptitious interception of private communications, contrary to s. 191(1) of the *Criminal Code*; cruel or disgraceful conduct, contrary to s. 93 NDA; and, conduct to the prejudice of good order and discipline, contrary to s. 129 NDA. He was sentenced to imprisonment for a period of 36 months and dismissal with disgrace from Her Majesty's service.

At trial, Cpl McGregor made an application under s. 8 of the *Charter*, alleging that the search of his home in Virginia, USA and the subsequent seizure and search of electronics was unlawful. This was dismissed by the military judge after a contested hearing on 13 September 2018. The evidence seized was admitted in evidence.

Cpl McGregor appeals the legality of the finding concerning his application under s. 8 of the *Charter* and further seeks leave to appeal his conviction and sentence.

R v Pett, CMAC-603

MCpl Pett was charged with one count of an offence contrary to the NDA s. 85 (insubordinate behaviour) and one count of an offence contrary to the NDA s. 95 (abuse of subordinates).

On 2 October 2019, the CDS issued an order in the form of a letter designating the DVCDS as the CO with respect to disciplinary matters involving military judges. At his SCM, MCpl Pett brought an application for plea in bar of trial alleging a breach of his right to a fair and

the view that no error was committed in applying the relevant sentencing principles. The Court found that as a separate system, the military justice system is not bound to follow civilian precedents when it is not in the interest of maintaining discipline, efficiency and morale of the CAF. The Court further rejected the argument that absent exceptional circumstances, a custodial sentence was required for breach of trust offences.

³⁶ Ibid at para 18.

³⁷ Costs were awarded by the CMAC on 22 April 2020, after the current reporting period. See *R v Banting*, 2020 CMAC 2.

public hearing by an independent and impartial tribunal under s. 11(d) of the *Charter* and seeking a stay of proceedings. The application was denied by the military judge and MCpl Pett was found guilty of both charges and sentenced to a reprimand and a \$1,500 fine.

MCpl Pett appealed the legality of the finding concerning his application under s. 11(d) of the *Charter*. However, on 23 April 2020 (during the next reporting period), he abandoned the appeal.

R v Renaud, CMAC-604

Capt Renaud was found guilty at his SCM of three counts of conduct to the prejudice of good order and discipline, contrary to s. 129 NDA, for inappropriate sexualized comments made during his deployment on Operation REASSURANCE in Romania. He was sentenced to a severe reprimand and a fine in the amount of \$2,500.

Capt Renaud appeals the legality of the military judge's findings on all counts of conduct to the prejudice of good order and discipline.

Please refer to Annex B for an overview of all appeals at the CMAC for the reporting period.

Decision Rendered by the SCC

R v Stillman, 2019 SCC 40

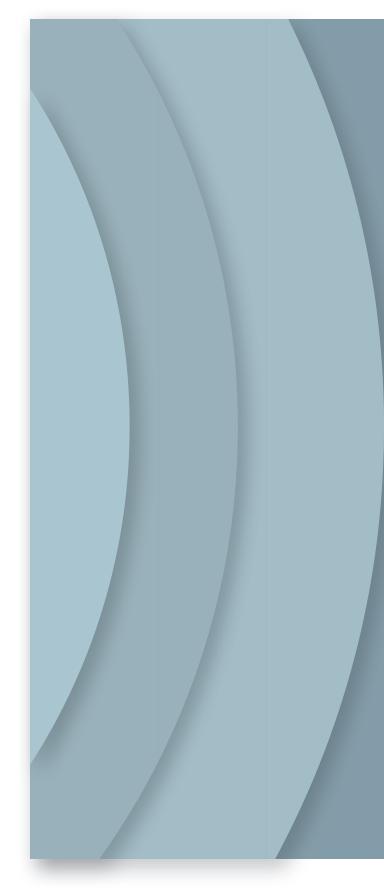
Please refer to Chapter 4 for a summary of the SCC decision in *R v Stillman*.

Applications for Leave to Appeal to the SCC

R v MacIntyre (SCC docket 38838)

On behalf of the MND, the DMP sought leave to appeal the case of *R v MacIntyre*, 2019 CMAC 3 to the SCC. Leave to appeal was denied on 9 January 2020.

Please refer to Annex C for an overview of all appeals at the SCC during the reporting period.





THE CONCLUSION OF R v STILLMAN



The SCC's decision in R v Stillman recognized that section 130(1)(a) of the NDA is constitutional and consistent with section 11(f) of the Charter. The Stillman decision upheld the CMAC's decision in R v $D\acute{e}ry$ ³⁹ and overturned the CMAC's decision in R v Beaudry.

BACKGROUND

On 19 September 2018, in *Beaudry*, the CMAC declared section 130(1)(a) of the NDA to be in violation of section 11(f) of the *Charter*.⁴¹ Specifically, the CMAC declared that section 130(1)(a) "is of no force or effect in its application to any civil offence for which the maximum sentence is five years or more."⁴²

The CMAC did not suspend its declaration of invalidity. This had a significant impact on prosecutions since at the time of the *Beaudry* ruling, there were 40 cases within the military justice system where the accused had been charged for a civil offence under section 130(1)(a) of the NDA. This included 21 cases involving sexual-related offences such as sexual assault, sexual exploitation and voyeurism. Within 48 hours of the CMAC decision in *Beaudry*, the DMP, on behalf of the MND, appealed the decision to the SCC and filed a motion requesting the SCC to order a stay of execution of the CMAC declaration of unconstitutionality of section 130(1)(a) of the NDA until the SCC had rendered a decision on the appeal.

On 13 November 2018, the Chief Justice of Canada directed that the cases of *Beaudry* and *Stillman* be heard together in a single hearing set for 26 March 2019, and on 14 January 2019, the SCC dismissed the request for a stay of execution. This meant that the finding of unconstitutionality of section 130(1)(a) remained in place and any accused individuals charged under that section could not be tried through the military justice system at that time for civil offences committed in Canada for which a maximum sentence is five years imprisonment or more.

Additionally, the DMP directed his team to, where appropriate, determine whether cases could proceed under other NDA charges or whether those cases should proceed through the civilian justice system. The DMP expressly required his prosecutors to ensure that the appropriateness of any charge was to be considered on a principled basis and was not to be done simply to deny an accused his or her right to be tried by a jury through the civilian criminal justice system. At the end of the previous reporting year, ten cases had been transferred to the civilian justice system. An information was laid in eight cases and civilian prosecutors declined to proceed in two cases.

The CMAC's decision in *Beaudry* was not the first time that the CMAC considered this issue. In June 2016, in the case of *R v Royes*, the CMAC unanimously ruled that section 130(1)(a) did not violate section 11(f) of the *Charter*.⁴³ Later, in May 2017, a majority of the CMAC in the case of *R v Déry* disagreed with the conclusions in *Royes*, but found that they were nevertheless bound by the *Royes* decision and ruled that section 130(1)(a) did not violate section 11(f) of the *Charter*.⁴⁴ Therefore, in *Beaudry*, the CMAC overturned two of its previous decisions on this matter.

³⁸ Stillman, supra note 14 at para 10.

³⁹ R v Déry, 2017 CMAC 2 [Déry].

⁴⁰ Beaudry, supra note 4.

⁴¹ *Ibid* at para 72.

⁴² *Ibid*.

⁴³ R v Royes, 2016 CMAC 1 at para 61 [Royes].

⁴⁴ Déry, supra note 39 at paras 97 and 99.

THE SCC'S DECISION IN STILLMAN

On 26 July 2019, in Stillman, the SCC ruled that section 130(1)(a) of the NDA is consistent with section 11(f) of the Charter.45

The SCC seized the opportunity to summarize and affirm its prior jurisprudence relating to the military justice system. First, the SCC recalled its decision in Mackay v The Queen which recognized the constitutionality of section 130(1)(a) as a valid exercise of Parliament's power under section 91(7) of the Constitution Act, 1867.46 The SCC also reemphasized its decision in R v Généreux, which recognized the uniqueness of the military justice system as an essential mechanism to properly perform the public function of "maintaining discipline and integrity in the Canadian Armed Forces."47 Finally, the SCC upheld its decision in R v Moriarity, and refused to require a military nexus when charging a service member under section 130(1)(a) other than "the accused's military status."48

The central issue for the SCC in Stillman was the application of the Charter's 11(f) exception to section 130(1)(a) of the NDA. To answer that question, the SCC first looked at the nature of the 11(f) exception, which involved a detailed comparison between a civilian jury and a military panel. The SCC then considered the objectives of section 130(1)(a) of the NDA, and whether or not offences under this provision were indeed offences under "military law."

In its decision, the SCC clearly distinguished the military panel from the civilian jury. The SCC's analysis is premised on the fact that the military justice system "has never provided for trial by jury." 49 While the SCC did find some similarities between civilian juries and military panels, the Court was clear that a military panel is not a jury.⁵⁰ Nevertheless, the SCC explained

that the military panel provides a similar level of Charter protection.⁵¹ The SCC explained that military panel members bring military experience and integrity to the military judicial process. They also provide "the input of the military community responsible for discipline and military efficiency."52 Given the construct of military panels, the SCC found that they provided sufficient protection to an accused, given the unique objectives of the military justice system.

Turning to the section 130(1)(a) analysis, the SCC unequivocally explained that there is no distinction between an offence directly codified in sections 73-129 of the NDA and those offences incorporated by reference under section 130(1)(a).53 The SCC found that "to reason otherwise would be to privilege form over substance."54 The SCC reminded us that Parliament has the power to decide what constitutes an offence under military law, by virtue of section 91(7) of the Constitution Act, 1867.55 Also, the SCC explained that the military justice system would not be able to achieve the unique military sentencing objectives listed in section 203.1(2) of the NDA if the CAF were unable to prosecute section 130(1)(a) offences.

In closing, the SCC discussed how prosecutors decide whether a service member's case proceeds through military or civilian courts. The Court explained that the role of deciding whether jurisdiction should be exercised in any particular case - and what factors guide that decision – is properly left to military prosecutors.⁵⁶ In this context, the SCC highlighted with approval the policy directive published by the DMP, which guides prosecutorial decisions.⁵⁷ Finally, the Court noted the historic and ongoing "cooperation and mutual respect" between military and civilian prosecutors in making those decisions.58

In the aftermath of the Stillman decision, Cpl Beaudry's conviction was restored. The cases that were transferred to the civilian justice system following the CMAC's decision in Beaudry are still proceeding. In some of those cases, military prosecutors have assisted their civilian counterparts in answering unreasonable delay

Stillman, supra note 14 at para 9.

Ibid at paras 4 and 113 citing Mackay v The Queen [1980] 2 SCR 370 at 397.

Ibid at paras 35, 36, 55 citing R v Généreux [1992] 1 SCR 259 at 293, 295, 297.

⁴⁸ Ibid at para 92, 96.

Ibid at para 77.

Ibid at para 68.

Ibid at para 44.

Ibid at para 66.

⁵³ Ibid at para 83.

⁵⁴ Ibid.

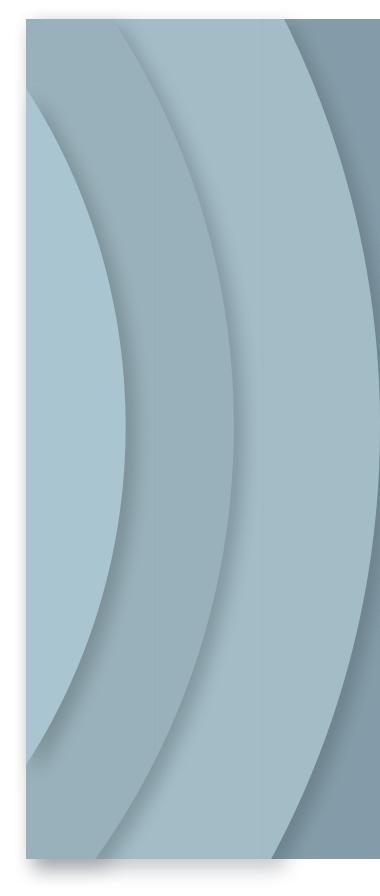
⁵⁵ Ibid at para 111.

⁵⁶ Ibid at para 103.

Ibid at para 102.

Ibid at para 103.

applications filed by defense counsels under section 11(b) of the *Charter*. In at least two cases where delay applications were filed, provincial court judges from the provinces of Quebec and Ontario have ruled that the delay resulting from the transfer of military cases to the civilian justice system by reason of the CMAC's decision in *Beaudry* constituted "exceptional circumstances" as defined by the SCC in *R v Jordan.*⁵⁹



⁵⁹ *R v Jordan*, 2016 SCC 27 at paras 69-81.



COMMUNICATION AND OUTREACH

Communication and outreach activities play a vital role in the legitimization of Canada's military justice system. From key players in the military justice process as well as national and international strategic partners and organizations, communication and outreach activities form an integral part of the DMP's strategic view to promoting Canada's military justice system. In that regard, the DMP has made a concerted effort to engage a number of organizations to further enhance the legitimacy of Canada's military justice system. This Chapter sets out those communications and outreach activities by the DMP over the course of the current reporting period.

While protecting the prosecutorial independence of the CMPS, the DMP recognizes the importance of maintaining collaborative relationships with the chain of command of the CAF. Collaborative relationships with the chain of command ensures that both entities work together to strengthen discipline and operational efficiency through a robust military justice system. During the reporting period the DMP continued his practice of proactively meeting with senior members of the chain of command on different military bases across Canada.

CAF CHAIN OF COMMAND

The military justice system is designed to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency, and morale. It also ensures that justice is administered fairly and with respect for the rule of law. As the military justice system is one of several tools available to the chain of command in order to help it reach these objectives, it is imperative that the DMP, and those prosecutors within the CMPS, actively and effectively engage the chain of command throughout the court martial process.

Recent amendments to the NDA have expressly recognized principles and purposes of sentencing within the military justice system distinct from the sentencing regime within the criminal justice system, along with unique military factors that must be taken into consideration in sentencing, such as the effect the offence had on the conduct of a military operation. In order for CMPS to fulfil its role, it is important for prosecutors to understand the context in which CAF units and formations are operating, and their needs in relation to the maintenance of discipline, efficiency and morale.

CFNIS

The CFNIS was established in 1997 with a mandate to investigate serious and sensitive matters related to DND and the CAF. It performs a function similar to that of a major crimes unit of the RCMP or large municipal police agency. It is important for all prosecutors to maintain a strong relationship with investigative agencies, while at the same time respecting the independence of each organization. Good relationships with investigative agencies ensure that the prosecutor and the investigator exercise their respective roles independently, but co-operatively, and help to maximize the CMPS's effectiveness and efficiency as a prosecution service.

In the course of this reporting period, the DMP, accompanied by his DDMPs or his ADMP, visited numerous CFNIS detachments across the country to discuss prosecution needs and strategic intent. In addition, the DMP presented at the CFNIS Indoctrination Course on topics such as the DMP's role and responsibilities, prosecutorial independence, and disclosure best practices. The presentation enhanced the incoming investigators' awareness of the legislative and regulatory framework surrounding the role of a military prosecutor.

FEDERAL, PROVINCIAL AND TERRITORIAL HEADS OF PROSECUTIONS COMMITTEE

The Federal, Provincial and Territorial Heads of Prosecutions (HoP) Committee was established in 1995. The Committee is made up of the heads of each of Canada's 12 prosecution agencies. This includes the heads of prosecution for the ten provincial prosecution services, as well as the Director of Public Prosecutions for the Public Prosecution Service of Canada and the DMP. The mandate of the HoP Committee is to serve as a national forum for the discussion of prosecutions and prosecutionrelated issues, and to facilitate the exchange of information and best practices on legal and managerial issues among the prosecution services of Canada. Since its inception, the Committee has helped promote assistance and cooperation among prosecution services and facilitated the coordination of national prosecution issues and the adoption of consistent prosecution positions on those issues whenever possible. The HoP Committee also serves as a national advisory body on prosecution issues in Canada, providing a venue where stakeholders can consult and seek the views of the Canadian prosecution community.⁶⁰

The Committee meets twice a year. Each prosecution service hosts a meeting on a rotating basis, with the head of the hosting agency acting as co-chair until the next meeting. The Committee may also meet on an *ad hoc* or urgent basis by teleconference or videoconference.

During this reporting period, the HoP Committee held two general meetings, both of which were personally attended by the DMP. The 57th general meeting was held in Quebec City, QC in July 2019 and the 58th general meeting was held in Winnipeg, MB in November 2019. The DMP was an active participant during the discussions, ensuring that the interests of the military justice system remain at the forefront of criminal law in Canada. The DMP also presented an update regarding the SCC decision in the matter of *Stillman*.

INTERNATIONAL ASSOCIATION OF PROSECUTORS

The International Association of Prosecutors (IAP) is the only world-wide association of prosecutors. It is non-governmental and non-political. It was established by the United Nations in 1995, in Vienna, and now has more than 183 organizational members from over 177 different countries, representing every continent. The IAP promotes the effective, fair, impartial, and efficient prosecution of criminal offences through high standards and principles, including procedures to prevent or address miscarriages of justice.

In addition, the IAP also promotes good relations between prosecution agencies and facilitates the exchange and dissemination of information, expertise and experience. Its annual conference is attended by prosecutors from a variety of nations, including other Canadian federal and provincial heads of prosecutions.

The DMP attended the IAP's 24th Annual Conference held in Buenos Aires, Argentina from 15-19 September 2019. The main theme of the 24th Annual Conference was "International Cooperation across Different Legal Systems", which explored how different legal systems facilitate international cooperation and overcome the legal and practical challenges of delivering across those different systems.⁶¹ The DMP cochaired the Network meetings for RMPs and provided various presentations during the conference related to recent decisions on military justice cases in Canada.

⁶⁰ https://www.ppsc-sppc.gc.ca/eng/tra/tr/05.html.

⁶¹ https://www.iap-association.org/Conferences/Annual-Conferences/24th-Annual-Conference-2019.

CMAC EDUCATION SEMINAR

The DMP and his ADMP both presented at this year's CMAC Education Seminar, an annual legal education seminar conducted for judges assigned to the CMAC organized by the Canadian Judicial Council and held in February 2020.

NATIONAL CRIMINAL LAW PROGRAM

The National Criminal Law Program (NCLP)⁶² is delivered by the Federation of Law Societies of Canada, and is the largest criminal law conference in Canada. The 46th Annual NCLP was held in Ottawa, Ontario in July 2019. The DMP participated as a member of the Faculty, delivering papers and presentations on a number of areas of criminal and military law topics.





⁶² https://flsc.ca/national-initiatives/national-criminal-law-program.



INFORMATION MANAGEMENT AND TECHNOLOGY

CASE MANAGEMENT SYSTEM (CMS)

The CMPS Case Management System (CMS) launched on 1 June 2018. The CMS is a file management tool and database used to monitor the progress of all cases referred to the DMP through the court martial process. In addition, it provides the DMP with statistics in real time about all cases proceeding through the court martial system.

The CMS tracks the status of files and collects data at the pre-charge, referral, post-charge, pre-trial and trial stages. All important dates associated with these files are recorded in the CMS, including but not limited to the dates when the file was referred to the DMP, when the file was assigned to a prosecutor, the date of the decision of the prosecutor on whether or not to prefer charges, and key dates in the court martial process. In addition, the CMS allows for the automatic creation of documents from compiled data, including but not limited to charge sheets and letters informing key actors when a charge has been preferred by a prosecutor.

The CMS continues to be improved through an iterative development process. The newest version of CMS was due to be released at the end of this reporting period. This version would also have included interoperability with the Justice Administration Information Management System (JAIMS), digitizing all aspects of the military justice process from charge laying to final disposition. Due to the CAF response to the COVID-19 pandemic, the release date of this next version of CMS was delayed until summer 2020; the next reporting period.



FINANCIAL INFORMATION

OPERATING BUDGET

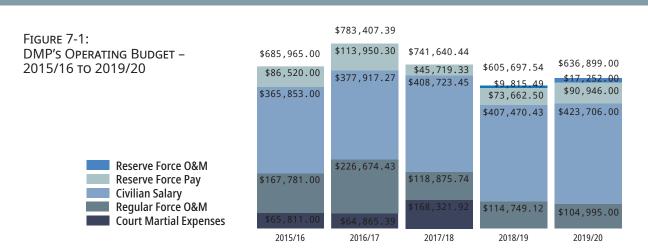
The DMP's operating budget is allocated primarily to operations and is divided into four main categories: Regular Force Operations and Maintenance, Civilian Salary and Wages, Reserve Force Pay and Reserve Force Operations and Maintenance. Operations and Maintenance includes items such as travel, training costs, general office expenditures and other costs that support the personnel and maintain equipment. A complete overview of the DMP's budget including initial allocation and expenditures can be found at Table 7-1.

Figure 7-1 shows the DMP's operating budget over the last five reporting periods.

In previous reporting periods, court martial expenses were included as part of the DMP's operating budget. Beginning last fiscal year, court martial expenses have been administered through a centralized fund. Due to various factors such as the number of courts martial, the duration of courts martial, as well as unpredictable expenses such as the requirement for expert witnesses, court martial expenditures can vary greatly from one reporting period to the next. This reporting period, the prosecution's portion of the expenditures for courts martial was \$325,866.49.

TABLE 7-1: SUMMARY OF DMP'S OPERATING BUDGET

Fund	Initial Allocation	Expenditures	Balance
Regular Force Operations & Maintenance	\$129,000.00	\$104,995.27	\$24,004.73
Civilian Salary & Wages	\$423,500.00	\$423,706.17	(\$206.17)
Reserve Force Pay	\$80,000.00	\$90,945.65	(\$10,945.65)
Reserve Force Operation and Maintenance	\$20,000.00	\$17,252.17	\$2,747.83
Totals	\$652,500.00	\$636,899.26	\$15,600.74



ANNEXES

Accused	Туре	Offence	Description	Disposition	Sentence	Location	Dates	Language
PO1 Alix	GCM	129 NDA	Conduct to the prejudice of good order and discipline	Not guilty	N/A	(CM) Esquimalt, BC	3-13 September 2019	English
		97 NDA	Drunkenness	Withdrawn				
Capt Anderson	SCM	125 NDA	Wilfully made a false entry in a document signed by her that was required for official purposes	Not guilty	N/A	Bagotville, QC	19 December 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
Capt Bannister (Retrial)	SCM	93 NDA	Cruel or disgraceful conduct	Withdrawn	Reduction in rank to the rank of Lt and	Charlotte- town, PEI	7 January 2020	French
	(Certai)	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	\$1,500 fine			
		93 NDA	Cruel or disgraceful conduct	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
Lt Banting	GCM	129 NDA	Conduct to the prejudice of good order and discipline	Not guilty	N/A	Petawawa, ON	2-5 April 2019	English
MCpl Barrieault	SCM	93 NDA	Cruel or disgraceful conduct	Guilty	Reduction in rank to the rank of Pte	Lazo, BC	4-5 June 2019	English
		129 NDA	An act to the prejudice of good order and discipline	Not guilty				
		93 NDA	Cruel or disgraceful conduct	Not guilty				
		129 NDA	An Act to the prejudice of good order and discipline	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				

ANNEX A:

COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
WO Beemer	SCM	117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 128 of the NDA	Guilty	Forfeiture of seniority of one year at the acting lacking rank of WO	Petawawa, ON	30 September- 3 October 2019	English
		129 NDA	Neglect to the prejudice of good order and discipline	Not guilty	and \$4,000 fine			
Sgt Beres	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn	N/A	Gatineau, QC	3 September 2019	English
Cpl Berlasty	SCM	117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 128 of the NDA	Guilty	Imprisonment for a period of 10 days (suspended) and \$4,000 fine	Windsor, ON	19-24 August 2019	English
SLt Brownlee	SCM	93 NDA	Cruel or disgraceful conduct	Guilty	Severe reprimand and \$3,000 fine	Halifax, NS	29 August 2019	English
		93 NDA	Cruel or disgraceful conduct	Guilty				
		93 NDA	Cruel or disgraceful conduct	Guilty				
Lt(N) Brumwell	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	\$200 fine	Halifax, NS	10 September 2019	English
Cpl Cadieux (Retrial)	SCM	130 NDA (271 Crim Code)	Sexual Assault	Guilty	Detention for a period of 60 days (suspended) and severe reprimand	Petawawa, ON	6-11 May 2019	English
		97 NDA	Drunkenness	Guilty	1			
Lt(N) Clancy	SCM	93 NDA	Cruel or disgraceful conduct	Not guilty	Severe reprimand and \$3,000 fine	Toronto, ON	18-27 November 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
Cpl D'Amico	GCM	129 NDA	Neglect to the prejudice of good order and discipline	Guilty	Absolute discharge	Meaford, ON	3-12 March 2020	English

Accused	Type	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Sgt Dagenais	SCM	112 NDA	Used a vehicle of the Canadian Forces for an unauthorized purpose	Guilty	\$500 fine	Gatineau, QC	4 February 2020	French
PO2 Darrigan	SCM	114 NDA	Stealing	Guilty	Severe reprimand and \$8,000 fine	Halifax, NS	14-16 May 2019	English
		130 NDA (355.2 <i>Crim</i> <i>Code</i>)	Trafficking in property obtained by crime	Withdrawn				
		130 NDA (354 Crim Code)	Possession of property obtained by crime	Withdrawn				
		115 NDA	Receiving	Withdrawn				
		116 NDA	Destruction, damage, loss or improper disposal	Guilty				
WO Deveaux	SCM	117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 178 of the NDA	Withdrawn	Severe reprimand and \$2,500 fine	Toronto, ON	21 January 2020	English
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
		125 NDA	Wilfully made a false entry in a document signed by him that was required for official purpose	Withdrawn				
Cpl Dion	SCM	130 NDA (271 Crim Code)	Mischief in relation to property	Guilty	Reprimand	Valcartier, QC	30 September 2019	French
		129 NDA	Uttering threats	Not guilty				
		95 NDA	Assault	Not guilty				

ANNEX A:

COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Maj Duquette	SCM	130 NDA (271 Crim Code)	Sexual Assault	Guilty	Sentencing hearing suspended until next reporting period because	Bagotville, QC	18-23 November 2019	French
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty	of COVID-19			
		95 NDA	Abuse of subordinates	Guilty				
Col Dutil	GCM	125 NDA	Wilfully made a false entry in a document signed by him that was required for official purposes	Withdrawn	N/A	Gatineau, QC	13 March 2020	French
		125 NDA	Wilfully made a false entry in a document signed by him that was required for official purposes					
		130 NDA (380 <i>Crim</i> <i>Code</i>)	Fraud					
		117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 178 of the NDA					
		129 NDA	Conduct to the prejudice of good order and discipline					
		129 NDA	Neglect to the prejudice of good order and discipline					
		129 NDA	Neglect to the prejudice of good order and discipline					
		129 NDA	Neglect to the prejudice of good order and discipline					

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Cpl Egers- Wood	SCM	129 NDA	Conduct to the prejudice of good order and discipline-	Guilty	Reprimand and \$3,000 fine	Halifax, NS	10 March 2020	English
		101.1 NDA	Failure to comply with a condition	Guilty				
OS Edwards	GCM	85 NDA	Insubordinate behavior	Guilty	\$150 fine	Esquimalt, BC	30 May 2019	English
		83 NDA	Disobedience of lawful command	Withdrawn				
		85 NDA	Insubordinate behavior	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
WO Gagnon	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	\$1,000 fine	Valcartier, QC	21 October 2019	French
Sgt Gauthier	SCM	108 NDA	Signing inaccurate certificate	Guilty	\$600 fine	Esquimalt, BC	4 September 2019	English
MCpl Girard	SCM	86 NDA	Quarrels and disturbances	Guilty	Reduction in rank to the rank of Pte and \$4,000 fine	Saint- Jean-sur- Richelieu, QC	27 January 2020	French
Sgt Hadley	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn	Severe reprimand and \$3,000 fine	Trenton, ON	9 December 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
SLt Havas	GCM	130 NDA (266 Crim Code)	Assault	Withdrawn	Severe reprimand and \$2,000 fine	Vancouver, BC	17 February 2020	English
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
MCpl Hogarth	SCM	114 NDA	Stealing	Guilty	Reprimand and \$1,500 fine	Halifax, NS	29 April - 3 May 2019	English
		130 NDA (356 Crim Code)	Theft from mail	Withdrawn			201)	
		115 NDA	Receiving	Withdrawn				
		130 NDA (354 Crim Code)	Possession of property ob-tained by crime	Withdrawn				
Capt Hunt	SCM	130 NDA (266 Crim Code)	Assault	Withdrawn	Severe reprimand	Gatineau, QC	7 May 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
LS Hynes	SCM	114 NDA	Stealing	Not guilty	\$2,000 fine	Halifax, NS	4 July 2019	English
		116 NDA	Destruction, damage, loss or improper disposal	Guilty				
Maj Ives	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Absolute discharge	Gander, NL	18 February 2020	English
		95 NDA	Abuse of subordinates	Withdrawn				
Maj Jacques	SCM	117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 178 of the NDA	Guilty	\$3,500 fine	Valcartier, QC	13 September 2019	French
		90 NDA	Absence without leave	Guilty				
Sgt Kirwin	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand and \$1,000	Edmonton, AB	12 March 2020	English
CWO Lacoste	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Not guilty	\$2,800 fine	Gatineau, QC	17 June 2019	French
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
		97 NDA	Drunkenness	Guilty				
Cpl Lafontaine	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand	Valcartier, QC	5 November 2019	French
Cpl Lewis	SCM	86 NDA	Quarrels and disturbances	Not guilty	N/A	Valcartier, QC	26-28 August 2019	English
		86 NDA	Quarrels and disturbances	Not guilty				
WO Lundy	SCM	108 NDA	Signed inaccurate certificate	Guilty	\$600 fine	Esquimalt, BC	4 November 2019	English
Cpl MacLeod	SCM	93 NDA	Cruel or disgraceful conduct	Guilty	Severe reprimand and \$3,000 fine	Gagetown, NB	14 March 2020	English

ANNEX A:

COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
WO Malone	GCM	95 NDA 129 NDA	Abuse of subordinates Conduct to the prejudice of good order and discipline	Withdrawn Guilty	Reprimand and \$1,500	Edmonton, AB	24 September 2019	English
		97 NDA	Drunkenness	Withdrawn				
Maj Mark	SCM	130 NDA (266 Crim Code)	Assault	Withdrawn	\$2,000 fine	Gatineau, QC	29 May 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				

Accused	Type	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Cpl McGregor	SCM	130 NDA (271 Crim Code)	Sexual assault	Guilty	Imprisonment for a period of 36 months and dismissal with disgrace from Her Majesty's	Esquimalt, BC	10-19 September 2018	English
		130 NDA (162 Crim Code)	Voyeurism	Guilty	service			
		130 NDA (162 Crim Code)	Voyeurism	Guilty				
		130 NDA (191 <i>Crim</i> <i>Code</i>)	Possession of a device for surreptitious interception of private communication	Not guilty				
		130 NDA (191 <i>Crim</i> <i>Code</i>)	Possession of a device for surreptitious interception of private communication	Guilty				
		93 NDA	Cruel or disgraceful conduct	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
CWO Mercer	SCM	86 NDA	Quarrels and disturbances	Guilty	\$500 fine	Petawawa, ON	29 January 2020	English
LCol Mosher	SCM	117 NDA	An act of a fraudulent nature not particularly specified in sections 73 to 178 of the NDA	Guilty	\$10,000 fine	Gatineau, QC	20 June 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				

ANNEX A:

COURTS MARTIAL

Accused	Type	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Cpl Olade- hinde	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Not guilty	N/A	Toronto, ON	15-17 July 2019	English
Cpl Parent	SCM	114 NDA	Stealing	Guilty	Reprimand and \$1,400 fine	Valcartier, QC	5 November 2019	French
		130 NDA (354 <i>Crim</i> <i>Code</i>)	Possession of property obtained by crime	Withdrawn				
MCpl Pett	SCM	85 NDA	behaviour	Guilty	Reprimand and \$1,500 fine	Toronto, ON	17 January 2020	English
		95 NDA	Abuse of subordinates	Guilty				
Bdr Poirier	GCM	93 NDA	Cruel or disgraceful conduct	Not guilty	N/A	Petawawa, ON	2-9 April 2019	French
		97 NDA	Drunkenness	Not guilty				
Capt Renaud	SCM	130 NDA (122 Crim Code)	Breach of trust by public officer	Not guilty	Severe reprimand and \$2,500 fine	Bagotville, QC	15 July 2019	French
		130 NDA (139 <i>Crim</i> <i>Code</i>)	Obstructing justice	Not guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
MS Rumbolt	SCM	130 NDA (267 Crim Code)	Assault with a weapon or causing bodily harm	Guilty	Severe reprimand and \$5,000 fine	Halifax, NS	23-24 September 2019	English

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
MCpl Savard	SCM	85 NDA	Insubordinate behaviour	Guilty	Severe reprimand and \$2,500 fine	Valcartier, QC	14 January 2020	French
		85 NDA	Insubordinate behaviour	Guilty				
Capt Stacey	GCM	129 NDA	Conduct to the prejudice of good order and discipline	Stay of proceedings	N/A	Gatineau, QC	29 November 2019	English
Cpl Thibault (Retrial)	SCM	130 NDA (271 <i>Crim</i> <i>Code</i>)	Sexual assault	Guilty	Sentencing hearing suspended until next reporting period because of COVID-19	Valcartier, QC	10-17 February 2020	French
MCpl Tuckett	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Not guilty	N/A	Borden, ON	15-22 July 2019	English
		129 NDA	Conduct to the prejudice of good order and discipline	Not guilty				
PO1 Thurber	SCM		Abuse of subordinates Abuse of subordinates	Guilty Withdrawn	Severe reprimand and \$1,500 fine	Halifax, NS	10 September 2019	English
OS Vandal	GCM		Cruel or disgraceful conduct	Withdrawn	N/A	Esquimalt, BC	21 February 2020	English
		93 NDA	Cruel or disgraceful conduct	Withdrawn			2020	
		93 NDA	Cruel or disgraceful conduct	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
OS White	SCM	101.1 NDA	Failure to comply with conditions	Guilty	\$500 fine	Kingston, ON	9 October 2019	English

ANNEX B:

APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

CMAC #	Appellant	Respondent	Type Of Appeal	Result
592	Her Majesty the Queen	Capt Bannister	Legality of Finding	Appeal is allowed, the four acquittals are quashed and a new trial on all charges is ordered before a different Military Judge
594	Her Majesty the Queen	Sgt MacIntyre	Legality of Finding	Appeal dismissed
595	Her Majesty the Queen	LS Edwards	Legality of Finding	Appeal allowed, the acquittal is quashed and a new trial is ordered
597	Her Majesty the Queen	Cpl Spriggs	Legality of Finding	Appeal abandoned by the Appellant
598	Her Majesty the Queen	Lt Banting	Legality of Finding	Appeal dismissed and motion for costs ongoing ¹
599	Her Majesty the Queen	PO2 Darrigan	Severity of the sentence	Appeal dismissed
600	Cpl Cadieux	Her Majesty the Queen	Legality of finding	Appeal abandoned by the Appellant
601	WO Malone	Her Majesty the Queen	Severity of the sentence	Appeal abandoned by the Appellant
602	Cpl McGregor	Her Majesty the Queen	Legality of finding and sentence	Ongoing ²
603	MCpl Pett	Her Majesty the Queen	Legality of finding	Ongoing ³
604	Capt Renaud	Her Majesty the Queen	Legality of finding	Ongoing

Motion for costs granted on appeal on 22 April 2020; during the next reporting period (see *R v Banting*, 2020 CMAC 2).

The hearing is scheduled for 26 June 2020; during the next reporting period.

Appeal was abandoned by the Appellant on 23 April 2020; during the next reporting period.

ANNEX C: APPEALS TO THE SUPREME COURT OF CANADA

SCC#	Appellant	Respondent	Type Of Appeal	Result
37701	MCpl Stillman et al.	Her Majesty the Queen	Legality of Finding (appeal by leave)	Appeals from following CMAC cases dated June 23 rd 2017 are dismissed:
				CMAC-567, CMAC-574, CMAC- 577, CMAC-580, CMAC-581, CMAC-583, CMAC-584,
38308	Her Majesty the Queen	Cpl Beaudry	Legality of Finding (appeal as of right)	Included in the MCpl Stillman et al. file
38838	Her Majesty the Queen	Sgt MacIntyre	Legality of Finding (appeal by leave)	Leave to appeal denied

ANNUAL REPORT 2019-2020 DIRECTOR OF DEFENCE COUNSEL SERVICES





*ANNUAL REPORT*2019- 2020

Director
Defence
Counsel
Services



OVERVIEW

- 1. This report covers the period from 1 April 2019 to 31 March 2020. It is prepared in accordance with article 101.11(4) of the *Queen's Regulations and Orders for the Canadian Armed Forces* (*Queen's Regulation and Orders*), which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services and requires that he report annually to the Judge Advocate General on the provision of legal services and the performance of other duties undertaken in furtherance of the Defence Counsel Services mandate. Up until 6 March 2020, the director was Colonel D.K. Fullerton. Since then, Colonel J-B. Cloutier was appointed as the director.
- 2. During the pandemic which began at the end of this reporting period, the Director of Defence Counsel Services has continued to fulfill his legislated mandate to provide legal advice on the duty line and legal representation for custody review hearings, pre-trial conferences, preliminary motions, courts martial and appeals.

ROLE OF DEFENCE COUNSEL SERVICES

- 3. Under section 249.17 of the *National Defence Act (NDA)* individuals, whether civilian or military, who are "liable to be charged, dealt with and tried under the Code of Service Discipline" have the "right to be represented in the circumstances and in the manner prescribed in regulations." Defence Counsel Services is the organization that is responsible for assisting individuals exercise these rights.
- 4. The Director of Defence Counsel Services is, under section 249.18 of the *National Defence Act*, appointed by the Minister of National Defence. Section 249.2 provides that the director acts under the "general supervision of the Judge Advocate General" and makes provision for the JAG to exercise this role through "general instructions or guidelines in writing in respect of Defence Counsel Services." Subsection 249.2(3) places on the director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public.
- 5. On 20 January 2019, the Chief of Staff Judge Advocate General (COS JAG) sent a document to legal officers within Defence Counsel Services (DCS) and the Canadian Military Prosecution Service (CMPS) who had reached five (or more) years within their respective service. In this document, COS JAG encouraged these experienced litigators to submit a request to be posted out of DCS and CMPS. This document is intended to be in accordance with the the Judge Advocate General "FIVE (5) YEAR POSTING RULE", published on 25 March 2019, in response to the Auditor General's 2018 report on the Administration of Justice in the Canadian Forces which identified a lack of litigation expertise within the military justice system. Pursuant to subsection 249.2(3) of the *National Defence Act*, a copy of the complete document is published as an annex to this report.

- 6. The director "provides, and supervises and directs" the provision of the legal services set out in Queen's Regulations and Orders. These services may be divided into the categories of "legal advice" where advice of a more summary nature is provided, often delivered as a result of calls to the duty counsel line, and "legal counsel" which typically involves a more sustained solicitor-client relationship with assigned counsel and representation of an accused before a Military Judge, a Court Martial, the Court Martial Appeal Court or the Supreme Court of Canada. Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and the Federal Court.
- 7. Legal advice is provided in situations where:
 - a) members are the subject of investigations under the Code of Service Discipline, summary investigations, or boards of inquiry, often at the time when they are being asked to make a statement or otherwise conscripted against themselves;
 - members are arrested or detained, especially in the 48 hour period within which the custody review officer must make a decision as to the individual's release from custody;
 - c) members are considering electing summary trial or waiving their right to court martial;
 - d) members are seeking advice of a general nature in preparation for a hearing by summary trial; and
 - e) members are considering an Application before a Commanding Officer to vary an intermittent sentence or the conditions imposed by a summary trial.
 - f) members are considering or preparing a Request for Review of the findings or punishment awarded to them at summary trial.
- 8. Legal representation by assigned counsel is provided in situations where:
 - a) custody review officers decline to release arrested individuals, such that a pre-trial custody hearing before a military judge is required;
 - b) members request or require a judicial review of release conditions imposed by a custody review officer;
 - c) there are reasonable grounds to believe that an accused is unfit to stand trial;
 - applications to refer charges to a court martial have been made against individuals;

- members apply to a Military Judge to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the Court Martial Appeal Court in the case of conditions imposed by that Court;
- f) members are appealing to the Court Martial Appeal Court or to the Supreme Court of Canada, or have made an application for leave to appeal and the Appeal Committee, established in Queen's Regulations and Orders, has approved representation at public expense; and
- g) in appeals by the Minister of National Defence to the Court Martial Appeal Court or the Supreme Court of Canada, in cases where members wish to be represented by Defence Counsel Services.
- 9. The statutory duties and functions of Defence Counsel Services are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients. Where demands for legal services fall outside the Defence Counsel Services mandate the members are advised to seek civilian counsel at their own expense.
- 10. Defence Counsel Services does not normally have the mandate to represent accused at summary trial. The military justice system relies upon the unit legal advisor, generally a Deputy Judge Advocate, to provide advice to the chain of command on the propriety of charges and the conduct and legality of the summary trial process, all with a view to ensuring that the accused is treated in accordance with the rule of law.

THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

11. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec. The office has consisted of the Director, the Deputy Director, an appellate counsel, five trial counsel at the rank of major/lieutenant-commander and one at the rank of captain. In addition to these Regular Force officers, seven Reserve Force legal officers at various locations in Canada assisted on matters part-time.

Administrative Support

12. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-4 and AS-1, as well as a paralegal whose position has been reclassified from EC-2 to EC-3. All AS-1 positions within the Office of the Judge Advocate General are currently under review. A preliminary draft of this reclassification review concludes that our AS-1 position should be reclassified as a CR-5 position.

Regular Force Resources

13. Defence Counsel Services are part of, and resourced through, the Office of the Judge Advocate General. During the reporting period, all Regular Force positions were filled. One Regular Force major was on parental leave for 6 months.

Reserve Counsel

- 14. As indicated, at the commencement of the year there were a total of seven Reserve Force defence counsel within the organization. One of them has reached compulsory retirement age on 16 March 2020.
- 15. Our Reserve Force counsel are located throughout Canada; with two in Quebec, four in Ontario, and one in British Columbia. They are an important component of our organization. They have made, and continue to make, a significant contribution to the Defence Counsel Services mandate.

Civilian Counsel

16. Under the *National Defence Act*, the Director of Defence Counsel Services may hire civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by Defence Counsel Services, no uniformed counsel are in a position to represent the particular individual. This occurs primarily as a result of a real or potential conflict of interest, often involving Defence Counsel Service's representation of a co-accused. It may occur for other reasons as well. During this reporting period, civilian counsels were hired by the director to represent members in three trial-level cases and one appeal.

Funding

17. During this fiscal year the following funds were spent.

	FUND	EXPENDITURE				
C125	Contracting (Counsel, Experts, and Services)	\$309,239.64				
L101	Operating Expenditures	\$19,250.22				
L111	Civilian Pay and Allowances	\$206,064.41				
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$324,972.81				
	TOTAL	\$859,527.08				

18. This amount is less than our operating budget numbers of \$877,472.00 and represents stable funding over the past few years.

19. Within Defence Counsel Services there are three methods of service delivery; Regular Force counsel, Reserve Force counsel and, pursuant to subsections 249.21(2) and (3), of the *National Defence Act*, contracted counsel. Regular Force counsel are the most cost effective means of service delivery and do not require the expenditure of budgeted funds. The use of Reserve Force counsel and contracted lawyers come at a cost.

SERVICES, ACTIVITIES AND TRAINING

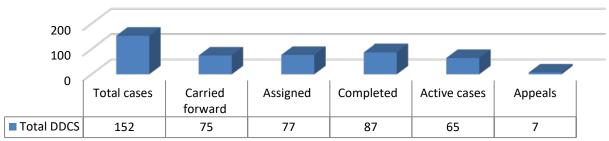
Duty Counsel Services

20. Legal advice is available twenty-four hours a day, seven days a week, to members who are under investigation or in custody. Legal advice is typically provided through our duty counsel line, a toll-free number which is distributed throughout the Canadian Armed Forces and is available on our website or through the military police and other authorities likely to be involved in investigations and detentions under the Code of Service Discipline.

Court Martial Services

- 21. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.
- 22. During this reporting period, approximately 59% of those who requested representation by Defence Counsel Services were, as shown below, able to move forward without conviction.
- 23. Defence Counsel Services provided legal representation to accused persons in 152 files referred for prosecution. This number includes 75 cases carried over from the previous reporting year. It also includes 77 new cases assigned to defence counsel during this reporting period. Of these 152 client files, 87 were completed. Of these 87, 40 members had their charges withdrawn after the assignment and involvement of counsel for the defence. Of the remaining 47 cases involving counsel appointed by the Director, in 9 cases the accused was found not guilty of all charges, two cases was stayed by a Military Judge, and in 36 cases the accused was either found guilty or pled guilty to at least one charge.

DDCS Casefiles 01 Apr 2019 to 31 March 2020



Results of Completed Cases F/Y 2019-2020



Appellate Services

- 24. Seven appeals at the Court Martial Appeal Court of Canada (the "CMAC") and one application for leave at the Supreme Court of Canada occured during this reporting period. Four appeals were filed by the Minister and three were filed on behalf of the accused. Of the three filed on behalf of the accused, two were subsequently abandoned before being heard by the Court. Of note, the Supreme Court of Canada rendered its decision in *R*. v. *Stillman*, 2019 SCC 40.
- 25. Where a member is the appellant and is requesting representation at public expense by Defence Counsel Services, he or she is required to make an application to the Appeal Committee, established under *Queen's Regulations and Orders*, who assess whether the appeal has merit. Members who are responding to appeals by the Minister may receive representation by Defence Counsel Services as a matter of right.

Supreme Court of Canada

26. On 26 July 2019, the Supreme Court of Canada rendered its decision in *R. v. Stillman*, 2019 SCC 40, which had been heard on 26 March 2019. The accused had asserted that section 130(1)(a) of the *National Defence Act (NDA*) violated their right to a trial by jury under section 11(f) of the *Charter*. The SCC, by a 5-2 majority, held that the phrase "an offence under military

law" in section 11(f) refers to an offence that is validly enacted pursuant to Parliament's power over the "Militia, Military and Naval Service, and Defence" under s. 91(7) of the *Constitution Act, 1867*; that section 130(1)(a) is such an offence; and therefore, the exception in section 11(f) of the *Charter* applies.

27. On 27 September 2019, the Director of Military Prosecutions, on behalf of Her Majesty the Queen, filed an application for leave to appeal to the Supreme Court of Canada from the judgment of the CMAC in the file of *R v MacIntyre* as noted below. The application for leave to appeal was dismissed on 09 January 2020.

Court Martial Appeal Court

- 28. The Director of Military Prosecution (the "DMP") appeal from acquittal *Canada* v. *Bannister* 2019 CMAC 2 was heard on 21 November 2018 and was allowed on 1 May 2019. Regarding the offence of disgraceful conduct under section 93 of the *NDA*, the CMAC unanimously held that expert evidence was not required to prove harm or risk of harm the military judge can use their own military experience and general service knowledge. Regarding the offence of conduct to the prejudice of good order and discipline under section 129 of the *NDA*, the CMAC unanimously followed its earlier decision in *R*. v *Golzari* 2017 CMAC 3. A new trial was ordered.
- 29. The DMP appeal from acquittal *R. v. MacIntyre* 2019 CMAC 3 was heard on 27 March 2019 and was dismissed on 28 June 2019. The DMP challenged the military judge's instructions to the General Court Martial panel relating to knowledge of the complainant's lack of consent and inadequate police investigation. The DMP argued that once the military judge ruled that there was no air of reality to the defence of honest but mistaken belief in consent, the essential element of the offence that the accused knew that the complainant was not consenting no longer applied. In other words, the only *mens rea* element is whether the accused intentionally touched the complainant. The CMAC unanimously held that knowledge of the absence of consent is always an essential element of the offence of sexual assault. The DMP application for leave to appeal to the SCC was dismissed 9 January 2020.
- 30. The DMP appeal from acquittal *R.* v *Edwards* 2019 CMAC 4 was heard on 13 June 2019 and was allowed on 31 October 2019. The accused had been acquitted of a charge under section 129 of the *NDA* for having used cocaine contrary to article 20.04 of the *Queen's Regulations and Orders*. The military judge had found that the DMP had proven neither the place, nor the time of the alleged usage. The accused conceded he was not prejudiced by the failure to prove the place of the offence. The CMAC unanimously held that the time of an offence only needs to be proven when it is an essential element of the offence, crucial to the defence, or the defence is misled by the particularized time.
- 31. The DMP appeal from acquittal in *R.* v. *Banting* 2019 CMAC 5 was dismissed from the bench on 28 October 2019, and judgment delivered 6 November 2019. The accused was not

represented by Defence Counsel Services. The CMAC simply upheld the military judge's decision that the DMP had not made a *prima facie* case. This case resulted in a \$10,000.00 cost award to the accused in *R*. v. *Banting* 2020 CMAC 2.

- 32. The DMP appeal of the sentence in *R. v. Darrigan* 2020 CMAC 1 was dismissed from the bench on 20 November 2019, and judgment delivered on 10 March 2020. The CMAC unanimously rejected the DMP submission that it should follow civilian sentencing jurisprudence. The CMAC held that the DMP submissions ignored the fundamental role of Canada's military and the *Code of Service Discipline*; and were contrary to the *NDA*, the CMAC sentencing jurisprudence, and civilian sentencing jurisprudence. The CMAC held that the jurisprudence does not establish categories of theft or fraud for which exceptional circumstances are required in order to justify a non-custodial sentence.
- 33. Notice of appeal was filed regarding the trial judgment in *R*. v *McGregor* 2018 CM 4023 on 4 October 2019 and was scheduled to be heard on 22 May 2020, but has been adjourned due to Covid-19.
- 34. A notice of appeal was filed by the member regarding the sentencing judgment in *R*. v *WO Malone* 2019 CM 5004 on 2 January 2019, but was abandoned.
- 35. A notice of appeal was filed by the member in *R.* v *MCpl Pett* 2020 CM 4002 on 10 February 2020 regarding an alleged violation of his right to be tried by an independent and impartial tribunal guaranteed under section 11(d) of the *Charter*, but was abandoned. The same constitutional question was raised in *R v Cpl D'Amico*, 2020 CM 2002, and will likely continue to be raised before courts martial in the coming year. In *Pett*, Military Judge Pelletier ruled that in order to obviate any concern about their independence or impartiality, military judges are not subject to prosecution under the Code of Service Discipline while they occupy judicial office. In *D'Amico*, Military Judge Sukstorff noted that this solution is best understood in the context of the recent unprecedented military prosecution against Chief Military Judge Colonel Mario Dutil: *R v Dutil*, 2019 CM 3003. In *DMP v Deputy Chief Military Judge*, 2020 FC 330, Justice Martineau provided a detailed exposé of the circumstances that gave rise to this prosecution. As a result, the Chief Military Judge was *de facto* removed from the bench up until the DMP withdrew the charges against him approximately two years later when, among other things, the Chief Military Judge had reached his reached compulsory retirement age.

Professional Development

36. The Federation of Law Societies' National Criminal Law Program remains the primary source of training in criminal law for counsel with Defence Counsel Services. In July 2019, seven Regular Force legal officers and three Reserve Force legal officers attended the conference in Ottawa, Ontario. Our in-house and JAG-wide annual Continuing Legal Education program was cancelled due to the COVID pandemic.

CONCLUSION

37. This reporting period concludes with the retirement of Colonel Delano Fullerton, who has served tirelessly as Director of Defence Counsel Services for the past decade. Under his stewardship, legal officers within Defence Counsel Services have provided outstanding legal services to qualifying members of the military community who request our assistance. As the incoming director, my priority will be to honor his legacy by providing an environment where clients can trust that their defence counsel is not only professionally competent but also loyal and independent from government.

J-B. Cloutier Colonel

Director of Defence Counsel Services

June 2020

ANNEX



Office of the Judge Advocate General

National Defence Headquarters MGen George R. Pearkes Building – 7th Floor 101 Colonel By Drive Ottawa, Ontario K1A 0K2 Juge-avocat général

Cabinet du

Quartier général de la Défense nationale Édifice mgén George R. Pearkes – 7^e étage 101, promenade Colonel By Ottawa (Ontario) K1A 0K2

0160-1-05600-01 (COS JAG)

20 January 2020

Distribution List

FIVE-YEAR POSTING RULE

Reference: JAG's Letter 0160-1-06580-13-0001 25 March 2019 (enclosed)

- 1. In accordance with the JAG's letter to me at reference, I wish to advise you that in July 2020, you will have reached five (or more) years with your respective service.
- 2. In light of this, I remind you of the opportunity to move elsewhere within the Office of the JAG, in order to broaden your legal experience through exposure to other areas of practice.
- 3. Doing so would enhance the capacity of the Office of the JAG to respond to a range of DND/CAF requirements, by increasing the number of legal officers who possess the leadership abilities, broad legal experience, and deep client knowledge necessary to successfully lead the Office and the Legal Branch in the years which lie ahead.
- 4. I encourage you to submit to me posting preferences that will assist the Office of the JAG in responding to these requirements, by enabling

0160-1-05600-01 (CÉM JAG)

20 janvier 2020

Liste de distribution

RÈGLE EN LIEN AVEC LES AFFECTIONS DE CINQ ANS

Référence : Lettre du JAG 0160-1-06580-13-0001 25 March 2019 (ci-joint)

- 1. Tel qu'indiqué dans la lettre en référence qui m'a été envoyée par le JAG, je vous informe qu'en juillet 2020, vous aurez complété cinq ans (ou plus) au sein de votre service respectif.
- 2. Suivant ceci, je vous rappelle que vous avez l'occasion d'être affecté au sein d'une autre division du Cabinet du JAG, afin d'élargir votre expérience juridique, en œuvrant dans d'autres sphères de pratique.
- 3. Ceci rehausserait la capacité du Cabinet du JAG à répondre à tout l'éventail d'exigences provenant des FAC/MDN, en augmentant le nombre d'avocats militaires possédant des aptitudes de leadership, une expérience juridique variée, ainsi qu'une connaissance pointue des clients, tous nécessaires pour mener le Cabinet et la Branche des Services juridiques sur la voie du futur.
- 4. Je vous encourage donc à me soumettre vos choix d'affectations qui permettront au Cabinet du JAG de répondre à ces exigences, tout en promouvant votre développement et

Canada

you to further your development and experience in other areas of practice.

5. I am available, should you wish to discuss this with me; you can also reach out to Maj Dery, ACOS Personnel, at 613-943-4526.

votre expérience dans un autre champ de pratique.

5. Je demeure disponible, si vous désiriez en discuter davantage; vous pouvez aussi communiquer avec le Maj Dery, CÉMA Personnel, au 613-943-4526.

Le Chef d'état-major du Juge avocat général Colonel

> M.J. Dow Colonel

Chief of Staff Judge Advocate General 613-996-6456

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0160-1-06580-13-0001

25 March 2019

Chief of Staff - Judge Advocate General

FIVE (5) YEAR POSTING RULE

As you know, on release of the Auditor General's report on the Administration of Justice in the Canadian Armed Forces in Spring 2018, I directed that most legal officers assigned to the Canadian Military Prosecution Service (CMPS) and Defence Counsel Services (DCS) were to remain in their positions for the 2018/2019 posting year.

Following that immediate response, and in advance of the 2019/2020 posting season, I directed that legal officers will be posted to CMPS or DCS for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank and to the Director of Military Prosecutions' or the Director of Defence Counsel Services' assessment of their respective operational requirements.

I confirm that this continues to be my direction to you, as the Chief of Staff for the Office of the JAG.

It is possible that this direction will change once the analysis of the Legal Officer occupation is completed. It is my hope that this analysis will provide the data to identify the appropriate approach to ensure the necessary litigation expertise, which could result in a different approach to postings within the Office of the JAG.

Geneviève Bernatchez

Commodore

613-992-3019 / 613-995-3155

c.c. Deputy Judge Advocate General – Military Justice Director of Defence Counsel Services Director of Military Prosecutions



Judge Advocate General

National Defence Headquarters Major-General George R. Pearkes Building 101 Colonel By Drive Ottawa, Ontario K1A 0K2 Quartier général de la Défense nationale Édifice Major-général George R. Pearkes

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101, promenade Colonel By Ottawa (Ontario) K1A 0K2

0160-1-06580-13-0001

Le 25 mars 2019

Chef d'état-major - Juge-avocat général

RÈGLE À L'ÉGARD DES AFFECTATIONS DE CINQ ANS

Comme vous le savez, lors de la publication du rapport du vérificateur général sur l'administration de la justice dans les Forces armées canadiennes au printemps 2018, j'ai émis une directive à l'effet que la majorité des avocats militaires affectés au Service canadien des poursuites militaires (SCPM) et aux Services d'avocats de la défense (SAD) devraient demeurer dans leur poste pour l'année d'affectation 2018-2019.

Suivant cette mesure immédiate et avant la période des affectations 2019-2020, j'ai émis comme directive que les avocats militaires affectés au SCPM et au SAD demeureraient dans leur poste pour un minimum de cinq ans, sous réserve de la disponibilité d'un poste vacant dans l'organisation au grade approprié et de l'évaluation du directeur – Poursuites militaires ou du directeur – Services d'avocats de la défense de leurs besoins opérationnels respectifs.

Je vous confirme, dans votre capacité de chef d'état-major du Cabinet du JAG, que cette directive n'a pas changée.

Il se peut que cette directive change lorsque l'analyse du groupe professionnel avocat militaire sera terminée. J'espère que cette analyse va générer des données qui permettront d'identifier l'approche appropriée pour assurer l'expertise nécessaire en matière de litige, ce qui pourrait engendrer une approche différente quant aux affectations au sein du Cabinet du JAG.

// Copie originale signée // Geneviève Bernatchez Commodore 613-992-3019 / 613-995-3155

c.c. Juge-avocat général adjoint – Justice militaire
 Directeur – Services d'avocats de la défense
 Directeur – Poursuites militaires

ANNEX E 2018-2019 SUMMARY TRIAL STAKEHOLDER SURVEY RESULTS

MILITARY JUSTICE STAKEHOLDER ENGAGEMENT PROJECT

2018-2019 SUMMARY TRIAL STAKEHOLDER SURVEY RESULTS

MILITARY JUSTICE STAKEHOLDER ENGAGEMENT PROJECT 1,2



¹ This report was prepared by the Military Justice Division of the Office of the Judge Advocate General. The research project was coordinated by the Director General Military Personnel Research and Analysis (DGMPRA), Social Science Research Review Board (SSRB), in accordance with DAOD 5062-0 and 5062-1. The SSRB coordination number is 1809/18N.

² For the purpose of publishing in the Judge Advocate General's Annual Report, the appendices have been removed. They are, however, available upon request.

Appendices omitted and available for review upon request

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EXECUTIVE SUMMARY

The Judge Advocate General (JAG) has directed that the superintendence of the military justice system (MJS) be enabled in a manner that ensures that the Government of Canada, the Department of National Defence (DND), the Canadian Armed Forces (CAF) and Canadians have confidence that the MJS is legitimate, effective and efficient; thereby promoting the discipline, efficiency and morale of the CAF.

With this strategic direction, the Military Justice Stakeholder Engagement Project (MJSEP) was created to connect with military justice stakeholders in order to measure the efficiency, effectiveness, and legitimacy of the MJS and to make data-driven improvements. MJSEP is part of the Office of the JAG's initiative to gather and analyze data on the administration of the MJS and to identify and correct weaknesses in the system. This initiative saw the creation of the Superintendence Enhancement and Assessment Project (SEAP) and the Superintendence Enhancement and Assessment Team (SEAT).

In addition to MJSEP, the SEAT also oversees the development of the Justice Administration and Information Management System (JAIMS) and the Military Justice System – Performance Monitoring Framework (MJS-PMF). Improved stakeholder engagement will complement the quantitative data which will be available through JAIMS (once fully launched). JAIMS, MJSEP and MJS-PMF form part of DND's responses to recommendations made in the 2018 reports by the Office of the Auditor General on the Administration of Justice in the Canadian Armed Forces, and by the Standing Committee on Public Accounts.³

The aim of the MJSEP is to collect subjective and qualitative (but also quantifiable and measurable) data from actors across the spectrum of the MJS. The 2018-2019 survey focused on military justice at the summary trial level, and in particular, the perceived fairness of the summary trial system. In order to collect the required data, electronic surveys were sent to all CAF members who had participated in the MJS at the summary trial level during the reporting period of 1 April 2018 to 31 March 2019. Of the 1330 participants involved,

996 received the MJSEP email survey request and 436 surveys were completed (a total response rate of 32.7%). Responses were received from 73 Accused members, 92 Assisting Officers, 119 Charge Layers, 110 Presiding Officers, 36 Commanding Officers, and 6 Review Authorities. Each respondent was asked a number of questions, which varied depending on their role in the summary trial system.

It is important to note that the accuracy and reliability of the survey results is uncertain. Given the response rate of 32.7%, the Director General Military Personnel Research and Analysis (DGMPRA) cannot certify that the results are necessarily representative of the entire population surveyed. In fact, bias will typically enter into a survey with a response rate below 80%. As such, the data collected by MJSEP is potentially affected by bias and partiality. This statistical frailty does not, however, eliminate the data's value altogether. The purpose of MJSEP is to deliver a snapshot of experiences from across the spectrum of the military justice system; not to declare with certitude that their views are necessarily representative of the stakeholders as a whole. Furthermore, one of the key goals of the 2018-2019 survey was to create a baseline of qualitative data, from which trends can be monitored in reporting periods to come.

Survey questions ranged from demographic information (years in the CAF, current unit and rank, official language, ethnic or visible minority status, etc.), to length of proceedings, adequacy of training and experience, resources consulted, opinion on legal assistance received, and overall experience within the military justice system. The questionnaire focused on the respondent's perceived fairness of the summary trial system. In some cases respondents were given the opportunity to provide comments in free-form text boxes.

The results of the 2018-2019 MJSEP are presented in this Summary Trial Stakeholder Survey Results document. The majority of non-accused respondents believed the summary trial system to be fair. 82% of Assisting Officers, 92% of Charge Layers, 97% of Commanding Officers, 99% of Presiding Officers, and 100% of Review Authorities responded that the military justice system is fair. Their concerns were primarily with regard to the timeliness of proceedings, and the adequacy of training and resources. Conversely, 51% of Accused respondents felt that the system is unfair. Issues were raised with respect to the training and preparedness of Assisting Officers, the timeliness of proceedings, the ability to make full answer and defence, and fairness in sentencing.

³ Further detail on those reports is provided in the Background section of this document.

The 2018-2019 MJSEP provides the JAG with a window into the perceptions of more than 400 actors involved in the summary trial system in the past year. This data is a valuable resource – especially as a baseline against which to evaluate future results – and its continued collection will help to develop a management action plan in order to improve the efficiency, effectiveness and legitimacy of the military justice system moving forward.

BACKGROUND

Sub-section 9.2 (1) of the *National Defence Act* (NDA) confers on the Judge Advocate General (JAG) "the superintendence of the administration of military justice in the Canadian Forces." To fulfill this mandate, the JAG directed the DJAG MJ within the Office of the JAG to survey stakeholders in the military justice system on a regular basis.

In the 2015/16 JAG Annual Report, the JAG announced the creation of an audit team in order to "develop and pilot a process for... [the collection of] objective and measurable data from a variety of sources and through a variety of mechanisms in order to assess the unit level administration of the Code of Service Discipline." In 2017, the JAG directed that the superintendence of the administration of the military justice system be enabled in a manner that ensures that the Government of Canada, the Department of National Defence, the Canadian Armed Forces and Canadians have confidence that the military justice system is legitimate (i.e., is lawful and meets Canadian values, such as fairness and transparency), effective and efficient, thereby promoting the discipline, efficiency and morale of the Canadian Armed Forces.

Based on this mandate, the Superintendence Enhancement and Assessment Project (SEAP) was created and personnel were assigned to the Superintendence Enhancement and Assessment Team (SEAT). The SEAT is working on two main sub-projects under SEAP: the

Justice Administration and Information Management System (JAIMS)⁴ and the Military Justice Stakeholder Engagement Project (MJSEP). Additionally, the SEAT is developing a Military Justice System Performance Monitoring Framework (MJS-PMF) in consultation with an internationally renowned criminal justice expert, Professor Yvon Dandurand.⁵

On 29 May 2018, the Office of the Auditor General (OAG) tabled its report on the Administration of Justice in the Canadian Armed Forces and provided nine recommendations to improve the administration of military justice.6 The OAG report was studied in the fall of 2018 by the House of Commons Standing Committee on Public Accounts (the "Committee").7 The Committee's report echoed and supplemented the findings and conclusions of the OAG. The Government agreed with all nine recommendations and, on 5 April 2019, submitted to the Committee a detailed Management Action Plan describing the measures the Government would undertake to address them.8 Five of the nine departmental responses to the recommendations are related to the ongoing work of the SEAP. MJSEP represents one of the current efforts by the Office of the JAG related specifically to recommendation #7 which provides that the DND should present the Committee with a report detailing what progress has been made with regard to its efforts to regularly assess the efficiency and effectiveness of the administration of the military justice system and to correct any identified weaknesses.

The MJSEP also aligns itself with the vision of the *CAF Data Strategy*, in that it promotes data being "leveraged in all aspects of Defence programs..." in order to provide "business intelligence and analytics for planning, reporting, and support to decision-making" as well as "to provide foresight and recommendations..." ⁹

The MJSEP consists of a focused survey designed primarily to collect subjective and qualitative (but also quantifiable and measurable) data from a variety

⁴ JAIMS will be an electronic system designed to seamlessly and electronically track military justice files from the reporting of an alleged infraction, through to investigation, charge laying, trial disposition and review in both the summary trial and court martial processes.

The MJS-PMF consists of justice indicators designed to summarize and communicate large amounts of critical data drawn from JAIMS, MJSEP and other means, on various aspects of the military justice system. The MJS-PMF is designed to monitor performance, identify potential issues, assist with establishing baselines, track progress, and assess the impact of interventions or reforms.

⁶ See: "2018 Spring Reports of the Office of the Auditor General: Administration of Justice in the CAF" available at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html

⁷ See: "Report 3, Administration of Justice in the CAF, of the 2018 Spring Reports of the Auditor General of Canada" available at: http://publications.gc.ca/site/eng/9.865712/publication.html

⁸ See: "Government Response to the report of the Standing Committee on Public Accounts, entitled: Report 3, Administration of Military Justice in the CAF, of the 2018 Spring Reports of the Auditor General of Canada" available at: https://www.ourcommons.ca/content/Committee/421/PACP/GovResponse/RP10404910/421_PACP_Rpt56_GR/421_PACP_Rpt56_GR-e.pdf

⁹ The Department of National Defence and Canadian Armed Forces Data Strategy, p. 9.

of military justice stakeholders. In FY 2018/2019, individuals who participated in the summary trial process within the military justice system were surveyed to collect data in order to help assess the efficiency, effectiveness and legitimacy (including perceived fairness) of the system and to make data-driven improvements.

METHODOLOGY

MJSEP

The primary objective of the 2018-2019 survey was to establish a baseline regarding stakeholder engagement and satisfaction with the MJS – specifically, within the summary trial process – for future monitoring. The secondary objective was to identify areas of concern to the members of the chain of command who perform specific roles within the MJS, and to examine matters that may not be evident from the available quantitative data.

The Office of the JAG currently collects and reports on military justice data on an annual basis. ¹⁰ Once JAIMS is fully operational, it is expected that much more data about the MJS will become available for instantaneous reporting and analysis. Additionally, the MJS-PMF will use justice indicators to summarize and communicate large amounts of critical data drawn from JAIMS, MJSEP and other means, on various aspects of the MJS. The MJS-PMF is designed to monitor performance, identify potential issues, assist with establishing baselines, track progress, and assess the impact of interventions or reforms. Through these initiatives, the system can be

improved by implementing evidence-based solutions to identified areas of concern. Such improvements will aim to increase the perceived and actual fairness of the system by improving its effectiveness, efficiency and legitimacy.

While the JAG Annual Report collects and reports on objective information about the MJS, objective data cannot always provide full insight regarding how stakeholders *subjectively* perceive and engage with the MJS. MJSEP seeks to explore the overarching issue of whether or not stakeholders are satisfied, on a *qualitative* basis, with the MJS.

Qualitative data can help measure the overall performance of the MJS, identify problematic areas, and develop strategies to improve and correct them. The 2018-2019 survey focused on individual actors' perceptions of "fairness" within the summary trial process. Understanding this qualitative data is crucial to a proper evaluation of the overall efficiency, effectiveness and legitimacy of the MJS.¹¹

In consultation with Professor Dandurand, indicators have been developed to help measure fairness over time. Once data has become available for more than two years, these indicators can be used for multi-year comparisons in order to better identify trends. This MJSEP Summary Trial Survey Results document sets the baseline against which future qualitative data may be compared. Table 1 sets out the indicators as developed for multi-year analysis.

TABLE	1.	INDICATORS	ESTABLISHED	TO	HELP	Measure	THE	PERCEPTION	OF	FAIRNESS	0F	THE	MILITARY
Justici	e S	YSTEM											

DIMENSION (Source)	INDICATORS	DESIRED TREND DIRECTION	RATIONALE		
Perceived	a. Changes in the perceived fairness of the MJS	Increasing	These indicators provide		
fairness of the	among Accused/convicted members	levels of fairness	information on the perceived		
Military Justice System (MJS)	(By gender, rank, type of offences, and component)		fairness of the MJS by Accused/		
	b. Changes in the perceived fairness of the MJS among MJS participants (COs, POs, AOs, and Witnesses) (By gender, rank, environment, and component)	Increasing levels of fairness	convicted members and other MJS participants, and are measures of the effectiveness of the system and possibly proxy measures for the "legitimacy" of the system.		

¹⁰ See: Office of the Judge Advocate General Annual Reports available at: https://www.canada.ca/en/department-nationaldefence/corporate/reports-publications/military-law.html [JAG Annual Report].

See: Yvon Dandurand, Kittipong Kittayarak, & Alison MacPhail, "Justice Indicators and Criminal Justice Reform: A Reference Tool" (2015) International Centre for Criminal Law Reform and Criminal Justice Policy. See also: "State of the Criminal Justice System 2019 Report" (2019) Department of Justice, Government of Canada.

Survey Framework

To meet these objectives, an online survey was sent out to individuals who had participated in one or more summary trials between 1 April 2018 and 31 March 2019 ("the reporting period"). Survey methodology and questions were developed by the SEAT, with assistance and approval by the Office of the Director General Military Personnel Research & Analysis (DGMPRA). DGMPRA digitalized and administered the surveys and provided the SEAT with the results.

The following actors within the summary trial process were sent surveys as military justice stakeholders:

- Accused
- Assisting Officer (AO)
- Charge Layer (CL)
- Commanding Officer (CO)
- Presiding Officer (PO)
- Review Authority (RA)

The study included 412 summary trial processes that occurred between 1 April 2018 and 31 March 2019 within 136 different units across Canada.¹²

Table 2. Number in the CAF	R OF SUMMARY TR	IALS PER U NIT
Number of Summary Trials	Number of Units	Total
1	62	62
2	27	54
3	18	54
4	6	24
5	4	20
6	4	24
7	4	28
8	3	24
9	1	9
10	3	30
12	1	12
13	1	13
14	1	14
44	1	44
Total	136	412

¹² In accordance with QR&O 107.15, by the 7th day of each month, units are responsible for forwarding copies of enumerated documents related to a disciplinary proceeding conducted in the preceding month to the nearest office of the Judge Advocate General. Based on these returns, the office of the Judge Advocate General identified 412 summary trials which took place during the reporting period.

Table 2 lists the number of summary trials that occurred per unit. At most units across the CAF, very few summary trials were held in the reporting period. For instance, 79% of units held only 1, 2, or 3 summary trials, representing 41% of the total summary trials during the reporting period. By comparison, 17% of the total of summary trials held during the same period took place within 3 units. Units with a large frequency of summary trials tend to be those with large populations or high rates of turnover, such as the Canadian Forces Leadership and Recruit School (CFLRS) or the Royal Canadian Electrical and Mechanical Engineers School (RCEMES).

From the 412 identified summary trials taking place during the reporting period, 1330 known individuals were identified as having participated in the summary trial process. Out of these known individuals, 1248 email addresses were obtained, from which 1179 unique email addresses were identified. 69 individuals were identified as having played multiple roles in the system.

	3. NUMBER OF S	Actors and	Number 0	F
S/N	Roles	Number of Actors	Number of Emails Gathered	%
1	Accused	395	350	89%
2	Assisting Officer	349	327	94%
3	Charge Layer	229	222	97%
4	Commanding Officer	85	84	99%
5	Presiding Officer	256	249	97%
6	Review Authority	16	16	100%
Total		1330	1248	94%

The online survey was sent out to the identified individuals on 7 May 2019 and closed on 3 June 2019. Some emails were not received due to Out of Office notifications, full mailboxes, and invalid email addresses. In sum, 996 of the 1248 identified emails were sent without any reported issues.

Individuals were given approximately one month to complete the survey. An introductory email was sent with the link to the survey to all identified participants. A reminder email to complete the survey was sent a week before it closed.

Survey Software

The *Snap Survey Software* was used to conduct this survey. The software is used by DGMPRA for all of their supported surveys and is approved for use on the DWAN.¹³ It is managed by Military Personnel Command (MILPERSCOM) / Military Personnel Generation (MILPERSGEN) in Kingston. Once the survey closed, reports were automatically generated by the *Snap Survey Software* with the results of each question. The results outlined in this document are based off of the numbers provided in the *Snap Survey Software* reports. Random checks of the raw data were conducted in order to ensure accuracy of the *Snap Survey Software* reports. ¹⁴

GENERAL INFORMATION

Response Rates

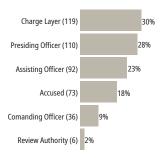
Survey participants were given the opportunity to skip any questions they did not wish to answer, and to terminate their participation at any stage of the survey. A survey was considered complete if an individual completed the following two sections of the survey:

- · Demographics; and,
- At least 1 section related to a role played in the summary trial system.

Individuals who participated in more than one role in the summary trial process in the reporting period were asked to fill out multiple sections of the survey. For example, certain respondents acted as a Commanding Officer in one proceeding, and a Presiding Officer in another. ¹⁵ 30 respondents indicated that they had 2 roles within the reporting period and 5 respondents indicated they had 3 roles. *Graph 1* shows that a total of 436 results were received for all of the roles in the summary trial survey:

GRAPH 1. TOTAL NUMBER OF ACTORS PER ROLE IN THE SUMMARY TRIAL PROCESS IN THE 2018/2019 REPORTING PERIOD

In the past 12 months, in which summary trial role(s) were you involved?
Please check all that apply.



In terms of actual response rates, returns were relatively low. ¹⁶ See Table 4, below:

TABLE	4. RESPONSE RATES				
S/N	Roles	Number of Actors	Emails Sent	Responses	Representation of Stakeholder Group
1	Accused	395	349	73	18.4%
2	Assisting Officer	349	322	92	26.3%
3	Charge Layer	229	221	119	51.9%
4	Commanding Officer	85	79	36	42.3%
5	Presiding Officer	256	199	110	42.9%
6	Review Authority	16	9	6	37.5%
	Total	1330	1179	436	32.7%

¹³ The survey methodology was guided and approved by Colin Mombourquette, CD2, MSc, Defence Scientist, DGMPRA Survey Development, DND/ CAF Social Science Research Review Board (SSRRB), Director General Military Personnel, Chief Military Personnel, Department of National Defence.

¹⁴ The Survey Questions are attached at Appendix A and the Snap Survey Report is attached at Appendix B to this document. Although the raw data was not verified against the Snap Survey Reports for each and every survey, a significant number of checks were completed to ensure precision. N.B. For the purpose of publishing in the Judge Advocate General's Annual Report, the appendices have been removed. They are, however, available upon request.

¹⁵ Commanding Officer and Presiding Officer was the most common pairing reported. 22 of the 35 respondents who identified as having multiple roles in the summary trial process selected this combination.

¹⁶ The reliability of this data is explored in greater detail in the Statistical Reliability section, below.

Demographics

Overall, 90% of respondents reported being in the Regular Force of the CAF, while 10% reported being in the Reserve Force. 68% of reservists who participated in the survey were Class B reservists, 28% were Class A and 5% were class C.

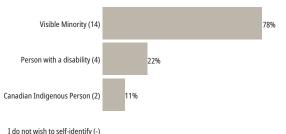
87% of respondents identified as male and 13% identified as female. 72% respondents reported English as their official language of choice for the report and 28% selected French.

73% of respondents indicated that they were over the age of 35. Specifically, 37% of respondents stated they were over the age of 45 and 36% were between 35-44 years of age. 23% of respondents were between the ages of 25-34 and 4% were between the ages of 16-24.

91% of respondents self-identified as not belonging to any ethnic or visible minority group. 5% stated that they identified with one or more groups¹⁷ and 4% did not self-identify. Per *Graph 2*, of the 5% of respondents who self-identified as being part of an ethnic or minority group, 78% identified as visible minority, 22% reported being a person with a disability, and 11% identified as a Canadian indigenous person.

GRAPH 2. RESPONDENTS WHO SELF-IDENTIFIED AS BEING INDIGENOUS PEOPLES OF CANADA, VISIBLE MINORITY, OR A PERSON WITH DISABILITY

Please check all that apply.

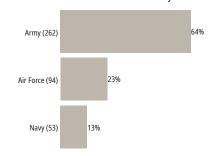


The following graphs provide information about the makeup of the population of respondents as members of the Canadian Armed Forces (CAF):

As shown in *Graph 3*, more than half of respondents (64%) reported being in the Canadian Army, while 23% were in the Air Force and 13% were in the Navy. *Graph*

GRAPH 3. RESPONDENTS CORRESPONDING ELEMENT

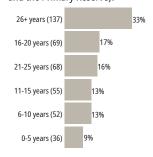
Which CAF environmental uniform do you currently wear?



4 below illustrates the number of years each respondent has been a member of the CAF. The majority of respondents (66%) have spent over 15 years in the CAF with half of these (33%) having spent 26 years or more.

GRAPH 4. THE NUMBER OF YEARS RESPONDENTS HAVE SERVED IN THE CAF

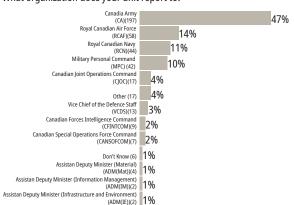
How many years have you served in the CAF (in both the Regular Force and the Primary Reserve)?



As seen in *Graph 5* below, 47% of the respondents' units belong to the Army, while the Air Force (14%) and Navy (11%) combined made up nearly another quarter of the respondents.

GRAPH 5. THE CAF ORGANIZATION TO WHICH THE RESPONDENT'S UNIT REPORTS

What organization does your unit report to?

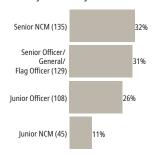


¹⁷ Groups include: Indigenous peoples of Canada, visible minority, or persons with disabilities.

Graph 6 shows the overall categories of ranks of the respondents. Over 63% of respondents reported being of a senior rank, with 32% as either a Senior NCM or 31% as Senior Officer/General/Flag Officer. 26% reported being a junior officer or 11% a junior NCM.

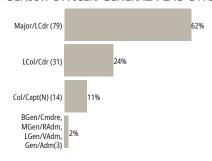
GRAPH 6. MILITARY RANKS FOR THE RESPONDENTS

What is your military rank?

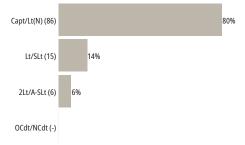


Graphs 7 through *10* depict the ranks of the respondents per rank category:

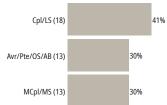
GRAPH 7. RANK OF RESPONDENTS WITHIN THE SENIOR OFFICER/GENERAL/FLAG OFFICER CATEGORY



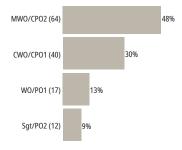
Graph 8. Rank of Respondents within the Junior Officer Category



Graph 9. Rank of Respondents within the Junior NCM category



GRAPH 10. RANK OF RESPONDENTS WITHIN THE SENIOR NCM CATEGORY



Given the demographic statistics collected by this survey, the majority of respondents involved in the summary trial system were non-minority Anglophone males over the age of 35 enrolled in the Regular Force of the Canadian Army and a member of the CAF for over 15 years.¹⁸

Statistical Reliability

As in any statistical exercise, it is important to keep in mind the limits of the data collected. In the context of a survey, one of the key criteria in determining reliability is the response rate.

Typically, a survey will aim for a response rate of 80%. If rates fall below this threshold, the likelihood of statistical bias increases. As indicated in the above section, the 2018/2019 survey had an overall response rate of 32.7%.

Statistical bias is defined as "the tendency of a measurement process to over- or under-estimate the value of a population parameter." A parameter is defined as "a measurable characteristic of a population." In the context of the present survey, statistical bias "would be the tendency of a sample statistic to systematically over-or under-estimate a population parameter." 19

With a response rate of 32.7%, it is probable that bias has entered into the results of the 2018-2019 Stakeholder Survey. As such, DGMPRA cannot certify that the results are necessarily representative of the entire population surveyed.²⁰ The aim of the survey, however,

¹⁸ Please note a GBA+ analysis was not completed on the survey results because the data used for this document was generated by the Snap Survey Software. A GBA+ analysis may be performed on the raw data by cross-referencing ranks, gender, position, and/or role played in the summary trial process.

¹⁹ https://stattrek.com/statistics/dictionary.aspx?definition=bias

²⁰ If response rates fall below 80%, it is recommended that

was to provide a snapshot of qualitative data from across the spectrum of the summary trial system and to create a baseline for comparison with future results. More than 400 actors chose to complete the survey and provide written feedback. This type of subjective data is critical to an appreciation of the perceptions of relevant actors and their day-to-day experiences, and can be used as a comparison point in future reporting periods. ²¹

RESULTS: FAIRNESS IN THE SUMMARY TRIAL PROCESS

"Not only must Justice be done; it must also be seen to be done." This well-known judicial statement properly situates the purposes of the 2018-2019 Summary Trial Stakeholder Survey. Ultimately, the efficiency, effectiveness and legitimacy of a justice system are directly linked to its perception.

All of the participants in the survey were asked the same question regarding the fairness of the summary trial process²³:

- 1. Do you feel the Canadian Armed Forces' <u>summary</u> <u>trial process</u> is:
 - a. Fair
 - b. Unfair

researchers conduct a thorough non-response bias analysis (U.S. Office of Management and Budget, Standards and Guidelines for Statistical Surveys, September 2006).

- 21 The 2018 Department of Justice report: "What We Heard: Transforming Canada's Criminal Justice System" was the culmination of a series of roundtable discussions with stakeholders from across the country. While not a survey, that report was also based on qualitative snapshots from a wide variety of actors. There (as here), statistical bias and subjective human selection played a role. The qualitative nature of this type of data, however, ensures that it retains some value in providing insight into the day-to-day experiences, thoughts, and concerns of at least some role players within the system.
- 22 R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233.
- 23 The survey also asked each respondent to rate the perceived fairness of the military justice system writ large. This data can be used to create a baseline if future surveys include a wider subject matter scope.

In reviewing the responses, a clear divide emerged between the Accused and every other actor involved in the summary trial process that was surveyed:

- Accused 51% unfair²⁴
- Assisting Officers 82% fair
- Charge Layers 92% fair
- Commanding Officers 97% fair
- Presiding Officers 99% fair
- Review Authority 100% fair²⁵

Accused members accounted for 18% of total survey respondents. A total of 22% of accused members who were sent surveys completed them (73 of 324) and 94% of those who completed the survey reported being found guilty at summary trial. 53% of Accused respondents had also been an Accused in a previous summary trial proceeding.

In order to identify future initiatives to ensure the summary trial system process remains legitimate, effective and efficient, it is helpful to review the survey respondents' views on fairness at each stage of the summary trial process: pre-trial, during the trial, and post-trial. This section provides an overview of the key results emerging from each of those stages.

Pre-Summary trial

A. Access to Information and Disclosure

74% of Accused respondents stated that they were provided access to information about the overall summary trial process. 18% stated that they did not need any information, and the remaining 8% felt that they did not receive adequate information about the summary trial process after being charged. Questions about the summary trial process ranged from information on summary trial procedure, reasons for charges, possible sentences, to whether the case would end up on their personal record. 27

89% of Accused respondents stated that they were given access to all of the evidence used in their summary trial. 96% of Assisting Officers agreed.²⁸ 11% of Accused said that they were not provided access to all the evidence used

^{24 34/67} Accused respondents believed the summary trial process to

²⁵ Appendix B at pp 32, 52, 89, 102, 118 & 126.

²⁶ Appendix B, p. 9.

²⁷ See comments at Appendix B, pp. 9-10. The comments tended to vary depending on the Accused's previous experience with the summary trial system.

²⁸ Appendix B, p. 21 and p. 48.

in their summary trial. Among those who stated that they did not receive all of the evidence, concerns related primarily to witness statements or other documentary evidence being provided at the last minute or changing at the summary trial.²⁹ 86% of Accused respondents said that the evidence was provided in an organized and readable manner, while 15% said that it was not.³⁰

In answering the question of when disclosure had been provided, 13% of Accused respondents selected before "deciding on whether to waive a limitation period," 30% selected before "deciding on whether to elect court martial," and 84% noted that it was provided before "the start of the summary trial."

B. PROCEDURE, PROCESS, AND DECISIONS

The majority of Charge Layers are officers or NCMs authorized by a Commanding Officer to lay charges (97%).³² For 75% of Charge Layer respondents, laying a charge is the only duty related to military justice that they perform.³³

86% of Charge Layers reported feeling that their career and background prepared them for this role, with comments generally suggesting that most Charge Layers learned how to perform this duty without specific or formal training.³⁴ The main identified source of training for Charge Layers was the Presiding Officer Certification Training provided by the Office of the JAG.³⁵

70% of Charge Layers reported having received training on how to conduct Unit Disciplinary Investigations³⁶ and 66% on how to lay charges from a member of the Office of the JAG.³⁷ 92% of those who completed the training found it prepared them to lay charges.³⁸ Most Charge Layers (63%) confirmed their work with a legal adviser and some indicated through the free text comments that their unit Standard Operating Procedures require that legal advice is always sought prior to laying a charge.³⁹ 96% of summary trials were reported as being offered in the official language of choice of the Accused, and 99%

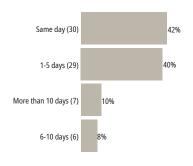
of Accused members stated that the Presiding Officer and the Assisting Officer had the ability to work in the language of his/her choice throughout the entire summary trial process. ⁴⁰ The majority of summary trials (82%) were held for one of the offences enumerated at *QR&O* Chapter 108.17(1)(a) for which an election to be tried at court martial need not be given. ⁴¹ Of those charged with such an offence, 57% were not offered an election to court martial and automatically proceeded to summary trial.

Of the Accused respondents who were offered an election to court martial, 17% stated that they asked for more than 24 hours to make their decision. Of those who made the request for additional time, 60% (3 out of 5 respondents) were granted the request.⁴²

100% of Accused respondents stated that they were assigned an Assisting Officer, and 82% were satisfied with the amount of time that it took for an Assisting Officer to be assigned. As shown in *Graph 11*, Assisting Officers were generally assigned on the same day or within a few days of charges being laid: 44

GRAPH 11. RESPONSES BY THE ACCUSED REGARDING LENGTH OF TIME FOR AN AO TO BE ASSIGNED

How long after the charge was laid, was the assisting officer assigned to you:



⁴⁰ Appendix B, p. 8.

- 41 See *Queen's Regulations and Orders for the Canadian Forces*, ch. 108.17(1)(a). Non-electable offences (otherwise known as the "minor five") include: s.85 *NDA* (Insubordinate Behaviour), s.86 *NDA* (Quarrels and Disturbances), s.90 *NDA* (Absence without Leave), s.90 *NDA* (Drunkenness), s.129 *NDA* (Conduct to the Prejudice of Good Order and Discipline but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment).
- 42 Appendix B, p.16. Survey responses from those who were not granted extra time (2/5) did not provide a reason for the request being denied.
- 43 Appendix B, p. 12.
- 44 Appendix B, p. 12.

²⁹ Appendix B, p. 21.

³⁰ Appendix B, p. 22.

³¹ Appendix B, p. 22.

³² Appendix B, p. 56.

³³ Appendix B, p. 83.

³⁴ Appendix B, p. 82.

³⁵ Appendix B, p. 67.

³⁶ Appendix B, p. 59.

³⁷ Appendix B, p. 62.

³⁸ Appendix B, p. 64.

³⁹ Appendix B, p. 70.

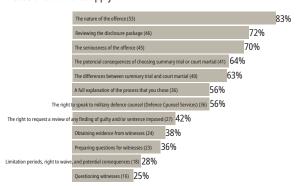
19% of Accused respondents stated that they requested a specific Assisting Officer.⁴⁵ Of that number, 57% stated that they were assigned the individual of their choice while 43% reported that they were not.⁴⁶

Graph 12 lists the topics Accused members inquired about with their Assisting Officer. From this graph, it is clear that Assisting Officers are expected to be knowledgeable in many aspects of the summary trial process and are relied upon to provide a broad range of advice. 47

GRAPH 12. RESPONSES BY THE ACCUSED INDICATING THE INFORMATION SOUGHT FROM HIS/HER ASSISTING OFFICER

Please indicate what your Assisting Officer explained or helped you with prior to and during your summary trial.

Please check all that apply.



The majority of Accused respondents (84%) indicated that they were unfamiliar with military justice system limitation periods or the right to waive them, although only 10% of respondents reported that they had to make a decision regarding their right to waive a limitation period in their particular case.⁴⁸ None of the Accused respondents stated that they requested more than 24 hours to make the decision.⁴⁹

GRAPH 13. RESPONSES BY THE ACCUSED REGARDING KNOWLEDGE OF THE RIGHT TO WAIVE LIMITATION PERIODS

In general, do you know about the right to waive both the 6 month limitation period for charge laying and/or the 1 year limitation period for summary trial commencement?



- 45 Appendix B, p.11.
- 46 Appendix B, p. 11. Survey responses did not provide information explaining why some specifically requested AOs were not assigned.
- 47 Appendix B, p. 14.
- 48 New limitation periods and waivers came into force Sept 1, 2018, approximately half-way through the reporting period.
- 49 Appendix B, p. 17.

60% of the Accused respondents indicated that they were provided contact information for Defence Counsel Services (DCS) prior to making a pre-trial decision and 34% of Accused respondents reported contacting DCS regarding their case.⁵⁰

68% of Accused respondents stated that there was enough time to make pre-trial decisions after receiving their disclosure package, 12% said that there was not enough time to make a pre-trial decision, and 20% responded that the question was not applicable to their case.⁵¹ 64% of Accused respondents (44 out of 69 respondents) reported that they had been given access to information that was beneficial to their defence, while 36% said that they had not.⁵²

c. Resources Used

A number of the survey questions focused on the use of resources throughout the trial. The most commonly used resources for each actor in the summary trial process were as follows (acronyms expanded in footnote below): ⁵³

- Accused Assisting Officer (81%), Colleague (36%), Supervisor (25%), MJSTL (25%)
- Assisting Officers GAAO (95%), MJSTL (60%)
- Charge Layers CLAM (76%), MJSTL (70%), JAG CWO (64%), and Legal Adviser (59%)
- Commanding Officers Legal Adviser (100%), MJSTL (94%), NDA/QR&Os (65%), GAAO (50%)
- Presiding Officers MJSTL (98%), Legal Adviser (94%), NDA/QR&Os (76%), GAAO (58%)
- Review Authority MJSTL (100%), Legal Adviser (100%), NDA/QR&Os (83%)⁵⁴

Considered as a whole, the data reflects two different experiences of resource use. The first grouping includes Accused and Assisting Officers, while the second grouping includes Charge Layers, Commanding Officers, Presiding Officers, and Review Authorities.

⁵⁰ Appendix B, p. 19.

⁵¹ Appendix B, p. 23.

⁵² Appendix B, p. 22.

⁵³ Acronyms are as follows: Charge Laying Aide Memoire (CLAM), Military Justice at the Summary trial Level (MJSTL), Guide for Accused and Assisting Officers (GAAO), National Defence Actl Queen's Regulations and Orders for the Canadian Forces (NDA/ OR&O)

⁵⁴ Appendix B, pp. 10, 37, 69, 95, 108 & 124.

GROUP 1: ACCUSED PERSONS AND ASSISTING OFFICERS

Accused respondents identified the Assisting Officer as their greatest resource.⁵⁵ However, while 81% of Accused respondents stated that they received information regarding the summary trial process from his/her Assisting Officer,⁵⁶ 21% "disagreed" or "strongly disagreed" with the statement that their Assisting Officer had been helpful throughout the process.⁵⁷

Likewise, some Assisting Officers reported that they did not feel as though they had adequate knowledge or experience to complete their tasks. Some Assisting Officers reported that they felt unprepared to be involved in the process. 58 95% of Assisting Officers relied on the Guide for Accused and Assisting Officers. 59 Module 3 of the Canadian Forces Junior Officer Development Program (CAFJOD) was also cited as a useful resource relied on by Assisting Officers. 60 A number of Assisting Officers suggested that a course which allows them the opportunity to run through some of the required tasks and duties in advance of taking on the position should be provided. 61

GROUP 2: CHARGE LAYERS, COMMANDING OFFICERS, PRESIDING OFFICERS, AND REVIEW AUTHORITIES

This group as a whole tended to rely mostly on the MJSTL, the legal adviser, the *NDA*, and the *QR&Os*. In their free text comments, Presiding Officers, Review Authorities and Charge Layers referred to the value of checklists or aide-memoires in performing their duties, which was borne out by the responses to the survey questions. 94% of Presiding Officers "always" or "almost always" used the Presiding Officer checklist in the MJSTL.⁶² Commanding Officers most often provided the GAAO (91%) and the MJSTL (85%) as resources to their members.⁶³

- 55 AOs agreed with this response. See Appendix B page 42.
- 56 Appendix B, p. 10.
- 57 Appendix B, pp. 13-16. Approximately half of the comments (22/45) by Accused respondents in the free-text area under this question suggested that the Assisting Officer did not have enough experience to be helpful.
- 58 Appendix B, p. 38.
- 59 Appendix B, p. 37.
- 60 Appendix B, p. 38-39.
- 61 Appendix B, p. 38-39. Approximately half of the comments (22/40) by Assisting Officer respondents in the free-text area under the question "What other types of training(s) do you feel would help you in performing your functions as an Assisting Officer?" recommended a formal Assisting Officer course or POCT.
- 62 Appendix B, p. 109.
- 63 Appendix B, p. 96.

The Summary trial

PROCESS

93% of Accused respondents reported that they were found guilty at their summary trial.⁶⁴ This percentage is in line with overall numbers reported in the JAG Annual Report for Fiscal Year 2018/2019 which reported that 89% of Accused members were found guilty.⁶⁵

All of the Presiding Officers surveyed indicated that they had completed Presiding Officer Certification Training, the re-certification training, and the Presiding Officer Certification Training-Update training.⁶⁶

SUBMISSIONS, EVIDENCE & WITNESSES

90% of Accused respondents reported that they were given an opportunity to present all of the evidence that they wished to submit at summary trial, while 10% reported that they were not.⁶⁷ 84% of Accused respondents indicated that they were permitted to question witnesses and/or make representations, and 81% reported they were given the opportunity to call their own witnesses.⁶⁸ Conversely, 16% stated that they had not been allowed to question witnesses and/or make representations, and 19% reported that they had not been given the chance to call their own witnesses.

Assisting Officers, on the other hand, reported being permitted to respond to the evidence and present evidence in 97% of cases.⁶⁹ 85% said they were confident in their ability to question witnesses.⁷⁰

⁶⁴ Appendix B, p. 25.

⁶⁵ JÄG Annual Reports are available at: https://www.canada.ca/en/ department-national-defence/corporate/reports-publications/ military-law.html

⁶⁶ Appendix B, pp. 105-106.

⁶⁷ Appendix B, p. 25.

⁸ Appendix B, p. 24.

⁶⁹ Appendix B, p. 50.

⁷⁰ Appendix B, p. 51.

TIMELINESS OF SUMMARY TRIALS

The following percentages of each respondent group expressed concerns with the timeliness of summary trials:

- Accused 36% unreasonable delay
- Assisting Officers 17% unreasonable delay
- Commanding Officers 11% unreasonable delay
- Presiding Officers 8% unreasonable delay⁷¹

Of the 36% of Accused respondents who stated that the summary trial was not conducted in a reasonable time, some noted in the free text comments waiting months or even a year for the summary trial to commence. Some Commanding Officers stated in the free text comments that issues with MP investigations and a negative effect on unit morale were the biggest concerns caused by delay.

In other situations, summary trials took place quickly, at times within a few days of the alleged offence. In those cases, some Accused respondents reported that there was not enough time to adequately prepare for their summary trial.⁷⁴

Post-Summary trial

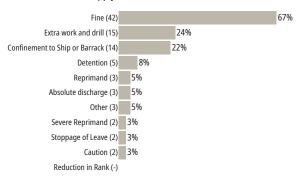
SENTENCING & PUNISHMENTS

Fines were reported as being by far the most common punishment imposed at a summary trial and were often paired with another punishment (usually reprimand or severe reprimand). 94% of Commanding Officers reported that they followed up to confirm that the punishment has been fully implemented.⁷⁵

The most common punishments imposed at summary trial and the length of time it took for them to be completed as reported by the Accused, are listed in the following two graphs: ⁷⁶

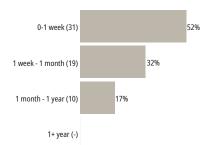
GRAPH 14. RESPONSES BY THE ACCUSED REGARDING PUNISHMENTS RECEIVED AT SUMMARY TRIAL

What punishment(s) were imposed in your sentence? Please check all that apply.



Graph 15. Responses by Accused Regarding Time to Complete a Punishment after a Summary trial

How long did it take to complete your punishment(s)?



⁷¹ See Appendix B, at pp. 31, 52, 102, & 117.

⁷² See comments at Appendix B, p. 31.

⁷³ See comments at Appendix B, p. 118.

⁷⁴ Appendix B, pp. 31 & 116.

⁷⁵ Appendix B, p. 99.

⁷⁶ Appendix B, p. 26. Note: JAG Annual Report 2018/2019 reported the following statistics for punishments at summary trial: Fine: 59.19%; Extra work and drill: 6.02%; Confinement to Ship or Barrack: 26.20%; Detention: 1.66%; Reprimand: 2.71%; Absolute discharge: 1.36%; Severe Reprimand: 0.45%; Stoppage of leave: 1.51%; Caution: 0.9%; Reduction in Rank: 0%. JAG Annual Reports are available at: https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law.html

48% of Accused persons felt they had been sentenced unfairly. Presiding Officers were not surveyed on their view of the fairness of the punishment that they imposed. Certain free-text comments, however, suggested that in some cases Presiding Officers wish for better sentencing resources to help them determine a fair and proper punishment which is consistent across the CAE.⁷⁷

GRAPH 16. RESPONSES BY THE ACCUSED REGARDING PERCEIVED FAIRNESS OF THE SENTENCE IMPOSED AT SUMMARY TRIAL

Do you think the sentence imposed was:

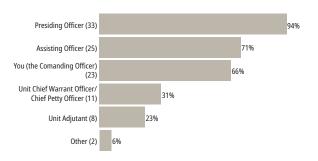


REVIEW OF THE SUMMARY TRIAL OUTCOME

Given the option to select all choices they believed apply, 94% of Commanding Officers stated that they believed it was the Presiding Officer's responsibility to inform the Accused of the right to request a review, while 71% and 66% felt it was the Assisting Officer and Commanding Officer's responsibility respectively.

Graph 17. Responses by COs Regarding the Responsibility to Inform the Accused of the Right to Request a Review of a Summary Trial Outcome⁷⁸

Who in your unit is resposible for informing the accused of the right to request a review of the outcome of the summary trial? Please check all that apply.



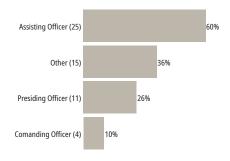
⁷⁷ Appendix B, pp. 101, 111, 112, 114, 116-117.

62% of the Accused respondents said they knew they could request a review of the Presiding Officer's decision after the Summary trial, whereas 38% noted that they were unaware. 60% reported that the Assisting Officer advised them of this process. 60% of Accused respondents stated that they found out about the possibility of requesting a review through other means. 61

91% of Assisting Officers stated that if the Accused was found guilty, they informed him/her of the right to request a review.⁸²

Graph 18. Reponses by the Accused Regarding the Source of Information on Requesting a Review of a Summary Trial Outcome

How did you find out about the possibility of requesting a review? Please check all that apply.



⁷⁸ Appendix B, p. 99.

⁷⁹ Appendix B, p. 29.

⁾ Ibid.

⁸¹ See comments at Appendix B, p. 30. The "other" category included individuals researching the option on their own or hearing about it from colleagues or others who had been through the system before. Some senior NCMs in the units are also cited as sources. In fact, pursuant to *QR&O* Chapter 108.20(12), the responsibility to inform an Accused member of their right to request a review rests with the Presiding Officer.

⁸² Appendix B, p. 51.

SATISFACTION WITH LEGAL ADVISERS

The survey results indicate that the role of the legal adviser is highly regarded throughout the summary trial process. Participants were positive when speaking about the legal advice they received and their interactions with JAG legal officers and generally reported being satisfied with their legal adviser:

- Accused 67% satisfied
- Assisting Officers 87% satisfied
- Charge Layers 92% satisfied
- Commanding Officers 98% satisfied
- Presiding Officers 97% satisfied
- Review Authority 100%83 satisfied

Timeliness of Legal Advice

Overall, 97% of the respondents stated that legal advice was provided in a timely manner, including 100% of Accused persons and Assisting Officers, 97% of Commanding Officers, 95% of Presiding Officers, and 100% of Review Authorities. 4 14% of Charge Layers found that legal advice was occasionally delayed. In particular, one Charge Layer free-text comment noted a delay of more than a month. As well, 29% of Commanding Officers found that legal advisers gave feedback on a submitted RDP sometimes, almost never, or never.

Access and Availability of Legal Advisers

Access to legal advisers is important to all actors in the summary trial system. Review Authorities reported seeking legal advice 100% of the time. Amongst Commanding Officers and Presiding Officers, there was a tendency to desire more "face time" with legal advisers, and a more consistent connection throughout the summary trial process. One individual commented that it is difficult for reservists to access legal advisers. According to Presiding Officers, even in cases where they were not required to seek advice from legal advisers, 78% still chose to do so. Similarly, Charge Layers chose to obtain legal advice "always" or "almost always" in 80% of cases where it was not required.

CONCLUSION

The 2018-2019 Summary Trial Stakeholder Survey sought to gather qualitative data on the summary trial process as part of the Office of the JAG's initiative to collect and analyze data on the administration of the MJS. In doing so, the survey has provided a snapshot of the perceptions and experiences of more than 400 actors in the military justice system.

This data supports the JAG in her statutory superintendence function and ensures that the military justice system is administered in a manner that provides the Government of Canada, DND, the CAF and Canadians with confidence that the system is legitimate, effective and efficient; thereby promoting the discipline, efficiency and morale of the CAF.

⁸³ Appendix B at p. 20, 47, 73, 100, 113, and 125.

⁸⁴ Appendix B at p. pp. 19, 47, 98, 114, 126.

⁸⁵ Appendix B at p. 76.

⁸⁶ Appendix B at p. 77.

⁸⁷ Appendix B at p. 98.

⁸⁸ Appendix B, p. 125.

⁸⁹ Appendix B, pp. 101, 112.

⁹⁰ Appendix B, p. 74.

⁹¹ Appendix B, p. 112.

⁹² Appendix B, p. 70.

ANNEX F MILITARY JUSTICE SYSTEM PERFORMANCE MONITORING FRAMEWORK

MILITARY JUSTICE SYSTEM PERFORMANCE MONITORING FRAMEWORK

YVON DANDURAND

SCHOOL OF CRIMINOLOGY AND CRIMINAL JUSTICE, UFV &

INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY

IN CO-OPERATION WITH THE DIRECTORATE OF MILITARY JUSTICE OPERATIONS

REPORT PREPARED FOR THE MILITARY JUSTICE DIVISION OFFICE OF THE JUDGE ADVOCATE GENERAL NATIONAL DEFENCE HEADQUARTERS

AUGUST 6, 2019

FORWARD

The Directorate of Military Justice Operations, within the Military Justice Division of the Office of the Judge Advocate General, has been generous in assisting me in the preparation of this Report. In particular, Major Greg Koenderman has helped guide my understanding of Canada's Military Justice System and has provided helpful feedback on draft versions of this Report.

INTRODUCTION

The goal of this project is to develop a performance monitoring framework (PMF) capable of delivering ongoing, objective, meaningful, and relevant data on the performance of the military justice system (MJS). This project is undertaken at a time when a parallel project is developing a Justice Administration and Information Management System (JAIMS) for all key military justice activities of the Office of the Judge Advocate General and the Canadian Armed Forces. As the performance monitoring framework is expected to rely heavily on the administrative data that will soon be available out of the information management system, it is important for the two projects to proceed in close consultation. This will help ensure that the chosen performance indicators are aligned, to the extent possible, with the data generated by JAIMS.

The purpose of this report is to identify, as a basis for internal consultations, the main elements of a performance monitoring framework for the MJS. The proposed performance framework includes more than two dozen indicators grouped under twenty or so main dimensions. A first group of indicators relates to the workload and activities of the MJS, a second group of indicators relates to the outputs of the MJS, while a third group relates to its immediate and longer-term outcomes. The use of military justice indicators relies on a process through which information about the MJS is collected, packaged and communicated so as to serve as a basis for learning, experimenting and decision-making within that system.

Following approval of the present proposal, the indicators and related metrics will be assessed and confirmed through testing of the framework based on available data.

BACKGROUND

In the public sector, performance measurement systems serve at least three main purposes: (1) improve performance management by providing timely feedback to managers on the activities, outputs and outcomes for which they are responsible; (2) provide a basis for an internal or external accountability structure for an organization; and, (3) support greater public transparency. The development of a PMF must keep these three objectives in mind, particularly in a context where managers are held accountable for delivering results. A strong PMF can generate a virtuous feedback loop to support organizational change and reforms in the MJS. A PMF is a useful tool to monitor performance, draw attention to issues, establish benchmarks, monitor progress, and evaluate the impact of changes and reforms. Together with other monitoring and evaluation mechanisms, a PMF is essential to providing feedback to policy makers and managers and, when made public, to contribute to greater transparency and public accountability.

In the case of the MJS, Canadian Armed Forces' (CAF) highest-ranking legal officer, the Judge Advocate General (JAG), is responsible for the superintendence of the administration of military justice in the CAF. Based on a review of the MJS, we can infer that the system's effectiveness, efficiency, and legitimacy are organizational goals and express the essential performance dimensions to be captured by a PMF for the MJS.

Defining, and eventually articulating, these performance dimensions will ensure that appropriate metrics are identified to monitor the outputs and outcomes of the MJS in relation to these dimensions. For the purpose of the present exercise, the definitions found in the Oxford English Dictionary, pending further elaboration, can provide a starting point:

- 1. *Efficient:* achieving maximum productivity with minimum wasted effort or expense;
- 2. *Effective*: successful in producing a desired or intended result; and
- 3. *Legitimate:* conforming to the law or to rules or able to be defended with logic or justification.¹

¹ The Merriam-Webster dictionary: "accordant with law or with established legal forms and requirements".

A PMF that can contribute to enhancing the effectiveness, efficiency, and legitimacy of the MJS must operate at two levels: (1) the level of the MJS as whole to measure the extent to which it is efficient, effective, and legitimate (performance of the MJS as a whole); and, (2) the level of MJS' various components to measure their individual performance as well as their contribution to the overall performance of the MJS.

MAIN CHARACTERISTICS OF THE PMF

Performance needs to be defined in a context-specific manner. For that purpose, we must at the outset articulate the most relevant elements of the MJS' performance, in relation to each of the key performance dimensions identified above (efficiency, effectiveness and legitimacy) as well as the specificity and legal basis of the military justice process.

It is possible to distinguish between major categories of justice indicators: input or activity indicators, output indicators, and outcome or strategic indicators. All three types of indicators are relevant to performance management.

Input indicators measure workload, activities, and the resources at the disposal of the system.

Output indicators measure the outputs produced by the system and its various components and, when compared to input indicators, targets, or benchmarks, provide a measure of *efficiency*. When compared to normative or legal standards, outputs can also provide a measure of legitimacy.

Outcome (or strategic) indicators measure performance against the broad objectives of the justice system (e.g., maintaining discipline, public safety, perceived legitimacy of the system as a whole, public confidence in the military justice system, fairness, etc.).

Comparisons between input and output indicators provide the basis for monitoring the efficiency of the justice system. Measures of outputs defined in relation to law or other normative standards offer a basis for measuring the legitimacy of the justice system. Measures of outcomes focus on the effectiveness of the system (the

results it achieves) in relation to the overall goals and objectives of the system.

It is neither necessary nor feasible for a PMF to measure everything. Although it may be tempting to develop an exhaustive list of indicators that cover all aspects and processes of the MJS, what is likely to be most useful is a comprehensive framework covering the relevant performance dimensions based on a relatively small number of key performance indicators (KPIs) and associated metrics. A manageable and sustainable PMF should limit itself to relatively few simple and unequivocal KPIs.

Choices have to be made about the KPIs that will be retained in the PMF. These choices are dictated by aspects of performance that need to be covered, the purpose to be served by each indicator, data availability, and the level of efforts and resources required to measure these indicators. The fact that the PMF is being developed concurrently with the development of JAIMS presents a unique opportunity to ensure that the information management system collects and reports data in a manner and format consistent with the PMF.

Several factors guide the development and implementation of a PMF, including the need for clarity about the objectives and scope of the framework, a preference for actionable and dynamic indicators, and the need for stable yet flexible measures. The framework should preferably rely on dynamic indicators, that is, indicators with a demonstrated capacity to capture and reveal some of the subtler changes in outputs and outcomes.

Measuring change over time is a crucial part of the exercise. Indicators are most revealing when the same measure is tracked over time, or at least against some baseline data. Successive or periodic data collection exercises make it possible to identify trends and to observe changes in various aspects of the justice system. However, the MJS is itself constantly changing, potentially making some performance indicators obsolete. The indicators must therefore be capable of adapting to changing circumstances while remaining stable enough to monitor change over time and identify trends. As with any performance monitoring framework, it is expected that adjustments and modifications may be required over time, as the framework is being applied and as the MJS evolves or priorities change.

Finally, if necessary, a PMF and its various indicators can be implemented incrementally as the organization's capacity to produce the necessary metrics increases. It sometimes makes sense to start with a few important indicators and then add to them over time when necessary.

At this point the proposed PMF does not anticipate the use of composite indices or indexes comprised of several indicators. The use of such indexes can be controversial because it can be difficult to come to an agreement on the selection of the component indicators and their relative weights within the index.²

SOURCES OF DATA

The proposed PMF relies on only two sources of quantitative data: administrative data and, to a lesser extent, survey data. The required administrative data are expected to be derived principally from JAIMS, as well as data available to the Directorate of Military Justice Operations.

Surveys can also be an important source of information on the performance of a system. And while surveys are sometimes thought to provide information that is less objective and thus less reliable than data generated through other means, much depends on the questions asked and also on how and when they are asked. There are obviously questions about the performance of the military justice system that can only be answered by people who, in different capacities, have had a direct experience of it.

MAIN DIMENSION OF THE PERFORMANCE MONITORING FRAMEWORK

The primary focus of the proposed PMF is on outcomes. However, to put these outcomes into context and to eventually be able to relate fluctuations in outcomes with variations in inputs, activities, or outputs, the proposed framework also includes measures of the latter.

System's Inputs and Activities

- Volume of cases
- Frequency of solving crime
- Frequency of military prosecutions
- Frequency of civil prosecutions
- Frequency of summary trials (ST)
- DMP Preferral Rate
- Frequency of courts martial (CM)
- Cost of CMs

² Composite indicators are typically calculated as a weighted average of a number of more specific indicators. An example of this would be a "crime severity index". These composite indicators (indexes) can be controversial because of the subjective element necessarily involved in selecting, scaling and weighting of the indicators.

System's Outputs

- Timeliness of process
- Pre-trial detention
- Early resolution of cases
- Outcomes of proceedings
- Legal assistance provided to accused
- Summary Trial Reviews
- Number of judicial reviews (Federal Court)
- Number of appeals to CM Appeal Court of Canada (CMAC)

System's Outcomes

- Outcomes of ST Reviews
- Outcomes of Federal Court judicial reviews
- Outcomes of appeals to CMAC
- Access to justice for accused members
- Access to justice for victims of service offences
- Confidence in the MJS among victims
- Confidence in the MJS among Commanding Officers
- Confidence in the MJS expressed by CAF members
- Perceived fairness of the MJS
- MJS contribution to Efficiency in the CAF
- MJS contribution to Discipline in the CAF
- MJS contribution to Morale in the CAF

THE PROPOSED PERFORMANCE MONITORING FRAMEWORK

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
	MJS INF	PUTS AND ACTIVIT	TIES
1. Volume of Cases (JAIMS)	a. Number of alleged offences reported in year ⁴	Not Applicable (N/A)	To put outcomes into context and to be able to relate fluctuations in outcomes with variations in inputs and activities, the PMF includes measures
	b. Annual change in the number of alleged offences reported in year as compared to previous year expressed as a percentage (by type of offences ⁵)	N/A	of inputs. The volume of cases entering the MJS is relevant to the understanding and interpretation of certain other indicators in the PMF.
2. Frequency of "solving" crime (JAIMS)	a. Clearance Rate (Total number of cases in which a charge is laid divided by total number of offences reported in a year) ⁶	Increasing	This indicator will provide insight into the effectiveness of the investigation process and its ability to identify the person responsible for a service offence. The clearance rate will also be relevant to the system's perceived legitimacy.

³ Note that all of these indicators can be used for multiple year comparisons once data is available for more than two years, including comparison with the average number over the previous n years. This permits the identification of trends.

Disciplinary Offences: 85 – Insubordination; 86 – Quarrels; 90 – AWOL; 97 – Drunkenness; 129 – Conduct to the Prejudice of Good Order and Discipline.

Federal Offences: 130 (All Criminal Code offences); 130 (All CDSA offences).

Violent/Serious Crimes: Offences included in Statscan Violent Crime Severity Index: homicide, other violations causing death, attempted murder, sexual assault, assault, firearms offences, robbery, forcible confinement or kidnapping, trafficking in persons, extortion, criminal harassment, uttering threats, indecent and harassing communications, non-consensual distribution of intimate images, commodification of sexual activity.

Property Offences: 113 – Causing fires; 114 – Stealing; 115 – Receiving property obtained from crime; 116 – Destruction of Property; 127 – injurious/destructive handling of dangerous substances.

Administrative Offences: 91 – False statement, 96 – false accusations; 108 – Signing inaccurate certificate; 117 – Miscellaneous offences; 121 – Fraudulent enrolment; 122 – False answer; 125 – Offences in relation to documents.

Conduct Offences: 83 – Disobedience; 84 – Striking a Superior; 87 – Escape from custody; 88 – Desertion; 93 – cruel or disgraceful conduct; 92 – Disgraceful conduct; 95 – Abuse of Subordinates; 98 – Malingering; 101.1 – Failure to comply with conditions; 111 – Improper driving of vehicles; 112 – Improper use of vehicles; 124 – Negligent performance of duty. **Other**: All other offences not itemized above.

This indicator only examines cases investigated and charged at the unit level. The Canadian Forces Provost Marshal Annual Report contains Clearance Rates for certain types of cases within its jurisdiction. Some offences reported in a year lead to charges in the following year, and charges laid in a year sometimes relate to offences reported in the previous year. This is acceptable, so long as this indicator is measured and reported in the same manner each year – the year to year comparisons then remain valid.

⁴ This indicator excludes alleged offences reported to Military Police which do not result in a police report being submitted to the CAF chain of command.

⁵ Types of Offences:

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
3. Frequency of military prosecutions (JAIMS)	a. Number of prosecutions initiated in the MJS (defined as a member being charged with one or more offences) in year	N/A	To put outcomes into context and to be able to relate fluctuations in outcomes with variations in inputs and activities, the PMF includes measures of inputs. The frequency of military prosecutions is
	b. Number of prosecutions completed in year	N/A	relevant to the understanding and interpretation of certain other indicators in the PMF.
	c. Annual change in the number of prosecutions initiated in year as compared to previous year, expressed as a percentage	N/A	
	d. Annual change in the number of prosecutions completed in year as compared to previous year, expressed as a percentage	N/A	
	e. Proportion of service tribunals that proceed as summary trials (vice court martial)	Greater than 90% ⁷	
	f. Percent of accused electing to be tried by court martial	Between 15% and 25% ⁸	Where accused members have an option between types of service tribunal, their choice could be relevant to the understanding of factors like perceived fairness, timeliness, access to justice, and others.
4. Frequency of civil prosecutions ⁹	a. Number of prosecutions initiated by military authorities in the civilian justice system (<i>by type of offences</i>)	Decreasing	The decision to pursue a prosecution in the civilian system rather than the MJS is relevant to the legitimacy (lawfulness, fairness, etc., including
(JAIMS)	b. Annual change in the number of prosecutions pursued by military authorities in the civilian justice system in year as compared to previous year, expressed as a percentage (by type of offences)	Decreasing	fairness to victims) and could also be related to the issue of efficiency.
5. Frequency of summary trials (JAIMS)	a. Number of summary trials (ST) completed in year (By type of offences and by type of summary trial: Delegated Officer, CO, Superior Commander)	N/A	To put outcomes into context and to be able to relate fluctuations in outcomes with variations in inputs and activities, the PMF includes measures of inputs. The frequency of summary trials is relevant
	b. Annual change in the number of ST completed in year as compared to previous year, expressed as a percentage (By type of offences and by type of summary trial)	N/A	to understand the volume of work moving through the ST system.
	c. Number of cases in which CO or Superior Commander decides not to proceed with one or more charges(s) laid	Decreasing	A decision not to proceed with one or more charges is relevant to the effectiveness of the investigative and charge-laying process and the legitimacy of
	d. Percentage of cases in which CO or Superior Commander decides not to proceed with one or more charges(s) laid	Decreasing	the ST system (lawfulness, fairness, etc., including fairness to victims) and could also be related to the issue of efficiency.

Based on historical proportion from 2013/2014 to the present.

Based on historical range from 2013/2014 to the present.

This dimension relates to prosecutions where military authorities have the discretion to proceed through either the civilian or the military justice systems and decide to use the civilian justice system.

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
6. DMP Preferral Rate (JAIMS)	a. Number of DMP Preferrals (files referred to DMP where charges are preferred) (By type of investigation: NIS, MP, Unit)	N/A	This indicator provides insight into the effectiveness, efficiency, and legitimacy of the investigative, charge laying, and referral process. If the referral package provided to DMP supports a
	b. Annual change in the number of DMP Preferrals (<i>By type of investigation: NIS, MP, Unit</i>)	N/A	reasonable prospect of conviction (and it is in the public interest), then the DMP will prefer charge(s) against the accused. The decision not to prefer any
	c. Ratio of DMP Preferrals compared to total number of files referred to DMP (By type of investigation: NIS, MP, Unit)	Increasing ¹⁰	charges could suggest a deficiency in the MJS up to the point of the DMP's review.
7. Frequency of Courts Martial (JAIMS)	a. Number of Courts Martial (CM) completed in year (By type of offences, and by type of CM: General CM; Standing CM)	N/A	To put outcomes into context and to be able to relate fluctuations in outcomes with variations in inputs and activities, the PMF includes measures of inputs. The frequency of courts martial is relevant to understand the volume of work moving through the court martial system.
	b. Annual change in the number of CM completed in year as compared to previous year, expressed as a percentage (By type of offences, and by type of CM: General CM; Standing CM)	N/A	Recognizing that intangible aspects effect the length of courts martial, monitoring the average length of CMs provides information on the relative complexity of trials and when compared with other indicators provides insight into the efficiency of the
	c. Average length of CM (in sitting days)	N/A	court martial process.
8. Cost of Courts Martial	a. Average cost of OCMJ per trial (total annual expenditures / # of CM)	Decreasing	This indicator examines the efficiency of the court martial process by measuring the productivity of
(Admin Data ¹¹ and JAIMS)	b. Average cost of Prosecution per trial (total annual expenditures / # of CM)	Decreasing	its three constituent components in relation to their expense. The costs of courts martial depend
	c. Average cost of Defence Counsel Services per trial (total annual expenditures / # of CM)	Decreasing	on many factors. This indicator strives to provide generalized data relating to the costs of the three principal organizations responsible for delivering a courts martial system for the CAF.

The JAG is committed to respecting the independent role of statutory actors within the MJS. Monitoring a preferred direction of change in a MJS indicator should not be viewed as inconsistent with respecting the independent role of any statutory actor.
 Administrative data refers to data which is available to the Directorate of Military Justice Operations.

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
	M	JS OUTPUTS	
9. Timeliness of process (JAIMS)	a. Average amount of time (in days) elapsed between date of first reporting of alleged offence and date of charges being laid in the MJS (Excludes cases greater than 1 year, which will be individually reported)	Decreasing	Timeliness of process, including the time between the reporting of an alleged offence and the date charges are laid, is important to an effective, efficient, and legitimate military justice system. This indicator will monitor the timeliness of the MJS during the pre-charge period. Starting the clock from the date of first reporting, rather than the date of the offence will avoid skewing the indicator with historical reporting which can be decades after the date of the alleged offence.
	b. Average amount of time (in days) elapsed between charges being laid and case final resolution (By type of offences and type of service tribunal, for all service tribunals completed during the reporting year)	Decreasing	Timeliness of process is important to an effective, efficient, and legitimate military justice system. Accused have a constitutional right to be tried in a reasonable amount of time. ST must commence within 1 year of date of alleged offence (unless limitation period waiver
	c. Percent change in average amount of time (in days) between charges being laid and case final resolution compared to previous year (By type of offences and type of service tribunal)	N/A	by accused). CMs have been found to be subject to the SCC decision in <i>Jordan</i> and are subject to a presumptive ceiling of 18 months from the date of charge to the actual/anticipated end of the trial.
	d. Average age of all pending cases within the MJS on 31 March each year (in days, from date of charge)	Decreasing	This indicator examines the efficiency, effectiveness, and legitimacy of the MJS by measuring the timeliness with which cases are processed through
	e. Percent change in the average age of all pending cases compared to previous year	N/A	the system.
	f. Percent of cases in which one or more time standards is not met	Decreasing	
10. Pre-trial detention (JAIMS)	a. Number of pre-trial detention periods exceeding 5 days ¹²	N/A	This indicator points to legitimacy (and fairness) issues, particularly if one relates this indicator to the one on delays (age of case).
11. Early resolution of cases (JAIMS)	a. Percentage of cases in which a guilty plea to all charges is entered before a Court Martial	guilty Property of the people responsible for serving ather sufficient evidence to support a reprospect of conviction at CM, and proof for adjudication in a timely manner. The also provides information on the "quality decisions" to prosecute (efficiency), as we say the property of the people responsible for serving and provides and provides information on the "quality decisions" to prosecute (efficiency), as we say the people responsible for serving about the people responsible for serving ather the people responsible for serving at the peo	This indicator examines the system's ability to identify the people responsible for service offences, gather sufficient evidence to support a reasonable prospect of conviction at CM, and process the case for adjudication in a timely manner. This indicator also provides information on the "quality of the decisions" to prosecute (efficiency), as well as whether the decisions are legitimate.
	b. Percentage of cases in which prosecutor decides not to proceed (withdraw) with all charges(s) preferred by DMP	N/A	This indicator helps understand the appropriateness of charging decisions and provides insight into potential over-charging. It also provides a measure of the practice of plea bargaining in the MJS and provides insight into the effectiveness of the early resolution process.

Five days was identified as a reasonable amount of time to permit Military Justice actors to perform the Action Following Arrest and Initial Review, provided in QR&O chapter 105.

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
12. Outcomes of proceedings (JAIMS)	a. Percentage of convictions at ST (finding of guilt on one or more charge(s), or acquittal on all charges)	N/A	This indicator provides information on the "quality of the decisions" to charge and prosecute (efficiency), as well as whether the decisions are
	b. Percentage of convictions at CM (finding of guilt on one or more charge(s), or acquittal on all charges)	N/A	legitimate.
13. Legal assistance provided to accused (JAIMS)	a. Percentage of accused charged who are represented or receiving other forms of legal assistance from DDCS lawyer (By gender, type of offence, type of assistance, and type of proceedings)	Increasing	This indicator provides information on the fairness of the system to accused members, their rates of access to justice, and accused members perception of effectiveness of representation provided by DDCS.
14. Summary Trial Reviews (JAIMS)	a. Percentage of STs reviewed by Review Authorities	Between 3% and 6% ¹³	The indicator provides information on the ST system and convicted members' perception of fairness. It also relates to the quality of decisions made by presiding officers, which are directly related to effectiveness, efficiency, and legitimacy.
15. Number of judicial reviews (Federal Court) (Admin data)	a. Annual change in the number of cases reviewed by the Federal Court	Decreasing	This indicator provides information on the ST system and its review process which is directly related to its effectiveness, efficiency and legitimacy.
16. Number of appeals to CM Appeal Court of Canada (JAIMS)	a. Annual change in the number of cases appealed to the CMAC	Decreasing	This indicator provides information on the CM system and is directly related to its effectiveness, efficiency and legitimacy.
	M.	JS OUTCOMES	
17. Outcomes of ST Reviews (JAIMS)	a. Percentage of ST Reviews in which the Review Authority upholds the Presiding Officer's decision	Increasing	This indicator provides information related to the quality of decisions made by presiding officers which is directly related to the effectiveness, efficiency, and legitimacy the ST system.
18. Outcomes of judicial reviews (Admin Data)	a. Percentage of Judicial Reviews in which Federal Court denies request (Applicant's request entirely denied versus allowed in whole/part or) by type of review (ST, Review, Other)	Increasing	This indicator provides independent and impartial information on the effectiveness and legitimacy the ST system and its review process.
19. Outcomes of appeals to Court Martial Appeal Court	a. Percentage of appeals to CMAC in which the appeal is entirely dismissed (Appellant's appeal entirely dismissed versus allowed in whole/part)	Increasing	This indicator provides independent and impartial information on the effectiveness, efficiency, and legitimacy the CM system.
(JAIMS)			
(JAIMS) 20. Access to justice for accused (Survey data)	a. Percentage of accused/convicted members reporting satisfaction with their level of access to legal assistance (By gender, rank, type of offence, and component)	Increasing	This indicator provides information on the fairness of the system to accused members, their rates of access to justice, and accused members perception of effectiveness of representation provided by DDCS.
20. Access to justice for accused	members reporting satisfaction with their level of access to legal assistance (By gender, rank, type of offence, and	Increasing	of the system to accused members, their rates of access to justice, and accused members perception of effectiveness of representation provided by

¹³ Based on historical range from 2013/2014 to the present.

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
21. Access to justice for victims of service offences (Survey Data)	a. Percentage of victims of services offences reporting satisfaction with their level of access to legal assistance/information (<i>By gender, rank, type of offence, and component</i>)	Increasing	This indicator provides information on the effectiveness of the system as it relates to victims by assessing their rates of access to justice, through access to legal assistance and information.
	b. Percentage of victims reporting satisfaction with the CAF's procedural /administrative handling of their case (By gender, rank, type of offence, and component)	Increasing	This indicator provides information on victims' perception on the CAF's ability to effectively and efficiently administer the MJS and relates to morale and efficiency of the CAF.
22. Confidence in the MJS among Victims (JAIMS + Survey data)	a. Percent annual change in the number of alleged offences reported by victims ¹⁴ in year (<i>By gender, rank, type of offence, and component</i>)	N/A	This indicator provides information on victims' confidence in the MJS, their reporting behaviour, and is a measure of the credibility of the system and possibly a proxy measure for the "legitimacy" of the system.
	b. Percent annual change in the number of alleged offences reported (other than by victims) ¹⁵ in year (<i>By gender, rank, type of offence, and component</i>)	N/A	This indicator provides information on the confidence in the MJS, members' reporting behaviour, and is a measure of the credibility of the system and possibly a proxy measure for the "legitimacy" of the system.
	c. Percent of victims expressing confidence in the MJS and change over previous year. Measured using a five-point scale. (<i>By gender, rank, type of offence, and component</i>).	Increasing levels of confidence	
23. Confidence in the MJS among Commanding Officers (Survey data)	a. Percentage of commanding officers expressing confidence in the MJS (to promote discipline, efficiency, and morale) and change over previous year. Measured using a five-point scale. (By gender, rank, environment, and component).	Increasing levels of confidence	This indicator provides information on the reported confidence in the MJS by the leadership of the CAF and is a measure of the credibility of the system and possibly a proxy measure for the "legitimacy" of the system.
24. Confidence in the MJS expressed by CAF members (Survey data)	a. Percentage of CAF members expressing confidence in the MJS and change over previous year. Measured using a five-point scale. (<i>By gender, rank, environment, and component</i>).	Increasing levels of confidence	This indicator provides information on the reported confidence in the MJS by the members of the CAF and is a measure of the credibility of the system and possibly a proxy measure for the "legitimacy" of the system.

Percentage of respondents to a random survey of CAF members who have *experienced* victimization during the previous 12 months and reported their victimization to the authorities.

¹⁵ Percentage of respondents to a random survey of CAF members who have *witnessed* victimization during the previous 12 months and reported the victimization to the authorities.

DIMENSION (Source)	INDICATORS ³	DESIRED TREND DIRECTION	RATIONALE
25. Perceived fairness of the MJS (Survey data)	 a. Changes in the perceived fairness of the MJS among victims. Using a five-point scale. (<i>By gender, rank, type of offences, and component</i>). b. Changes in the perceived fairness of the MJS among accused/convicted members. Using a five-point scale. (<i>By gender, rank, type of offences, and component.</i>) 	Increasing levels of fairness Increasing levels of fairness	This indicator provides information on the perceived fairness of MJS by accused/convicted members, victims of service offences, and other MJS participants, and is a measure of the effectiveness of the system and possibly a proxy measure for the "legitimacy" of the system.
	c. Changes in the perceived fairness of the MJS among MJS participants (Commanding Officers, Presiding Officer, Assisting Officers, and Witnesses). Using a five-point scale. (By gender, rank, environment, and component).	Increasing levels of fairness	
26. MJS contribution to Efficiency in Canadian Armed Forces	To be developed. (This is a purpose of the MJS).		Further work, and perhaps experimentation, will be required to determine how to measure the contribution the MJS to the efficiency of the Canadian Armed Forces. One or more valid and reliable proxy indicators should be identified.
27. MJS contribution to Discipline in the Canadian Armed Forces.	To be developed. (This is a purpose of the MJS).		Further work, and perhaps experimentation, will be required to determine how to measure the contribution the MJS to the discipline of the Canadian Armed Forces. One or more valid and reliable proxy indicators should be identified.
28. MJS contribution to Morale in the Canadian Armed Forces	To be developed. (This is a purpose of the MJS).		Further work, and perhaps experimentation, will be required to determine how to measure the contribution the MJS to morale within CAF. One or more valid and reliable proxy indicators should be identified.

Throughout the lifecycle of the PMF, it should be periodically confirmed that the most valid and reliable indicators have been identified, and that any additions, deletions, or replacements be considered where necessary.

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ANNEX G MILITARY JUSTICE TIME STANDARDS¹

THE TABLE BELOW SETS OUT THE TIME STANDARDS APPLICABLE TO EVERY PHASE OF THE MILITARY JUSTICE SYSTEM.

ID	Phase of the Military Justice System	Time Starts (Date of:)	Time Ends (Date of:)	Time Standard ²	Source of Authority for Time Standard
		Pre-Trial	Detention		
1	Delivery of Report of Custody	Arrest	Delivery of Report of Custody	24 hours	NDA s 158.1(1)
2	Review of Report of Custody	Arrest	Delivery of Review of Report of Custody	48 hours	NDA s 158.2(1)
3	Military Judge Review of Custody ³	Arrest	Appearance Before Military Judge	As soon as practicable	<i>NDA</i> s 159(1)
4	Military Judge 90-Day Review of Custody	Arrest	Appearance Before Military Judge	90 days	<i>NDA</i> s 159.8
		Investigat	ive Process		
5	Investigation Initiated	Reporting of Offence	Investigator Assigned	3 days	CAFDAC ⁴
6	Unit Investigation (Regular Force)	Investigator Assigned	Investigation Report Submitted	15 days	CAFDAC
7	Unit Investigation (Reserve Force)	Investigator Assigned	Investigation Report Submitted	30 days	CAFDAC
		Charge Lay	ving Process		
8	Charge Layer Assigned	Investigation Report Submitted	Charge Layer Assigned	2 days	CAFDAC
9	Charge Laying - Legal Advice Not Required	Charge Layer Assigned	Charge Laying Decision	30 days	CAFDAC & VCDS
10	Charge Laying - Legal Advice Request	Charge Layer Assigned	Legal Advice Requested	3 days	CAFDAC
11	Charge Laying - Legal Advice Provided	Legal Advice Provided	Charge Laying Decision	30 days	CAFDAC & VCDS
12	Charge(s) Laid - Summary Trial	Alleged Offence	Charge(s) Laid	6 months	NDA s 163(1.1)

¹ Where legislation, regulation or policy did not specify a time standard, the applicable time standard was established following review and consultation with military justice system stakeholders.

² The time standard is the maximum amount of time in calendar days that may be used to complete the task (except where indicated). The publication of these time standards further allows their incorporation into the Justice Administration and Information Management System (JAIMS), a system that electronically tracks discipline files from the time a complaint is received to the time a file is closed, to further facilitate their tracking and enforcement. JAIMS will require decision makers at various stages to provide justifications should they not meet time standards, which will assist in identifying and resolving the causes of delays.

³ The Office of the Chief Military Judge is not subject to time standards. At weekly coordinating or pre-trial conferences held with counsel, military judges manage trial issues and promote fairness and efficiency of courts martial. The duties and functions of the Court Martial Administrator are specified in the *National Defence Act* and the *QR&O* to support the administration of courts martial.

The "Canadian Armed Forces Discipline Advisory Council". CAFDAC is mandated to discuss and provide input on matters pertaining to the maintenance of discipline and policies related to the continued effective functioning of the Code of Service Discipline. It is co-chaired by the Canadian Armed Forces Chief Warrant Officer and the Judge Advocate General Chief Warrant Officer and its membership includes the most senior non-commissioned members from each command and from other key organizations within the Canadian Armed Forces.

ANNEX G MILITARY JUSTICE TIME STANDARDS

ID	Phase of the Military Justice System	Time Starts (Date of:)	Time Ends (Date of:)	Time Standard ²	Source of Authority for Time Standard
		Legal .	Advice		
13	Pre-Charge Legal Advice	Legal Advice Requested	Legal Advice Provided	14 days	JAG Policy Directive 048/18, para 32
14	Pre-Charge Legal Advice - Prosecution Advice Required	Determination by unit legal advisor that a charge is likely to result in a court martial	Request Sent to Regional Military Prosecutor	5 days	JAG Policy Directive 048/18, para 32
15	Prosecution Pre-Charge Legal Advice –Summary Trial	Request Sent to Regional Military Prosecutor	Regional Military Prosecutor Advice Provided	14 days	DMP Policy Directive 002/00, para 43 ⁵
16	Prosecution Pre-Charge Legal Advice – Court Martial	Request Sent to Regional Military Prosecutor	Regional Military Prosecutor Advice Provided	30 days	DMP Policy Directive 002/00, para 43
17	Pre-Charge Legal Advice – With Prosecution Input	Regional Military Prosecutor Advice Provided	Legal Advice Provided	7 days	JAG Policy Directive 048/18, para 32
18	Post-Charge Legal Advice	Legal Advice Requested	Legal Advice Provided	7 days	JAG Policy Directive 048/18, para 5
		Pre-Trial – Si	ummary Trial		
19	Disclosure Provided to Accused	Charge(s) Laid	Disclosure Provided	3 days	CAFDAC
20	Election/Waiver Provided to Accused	Election/waiver Offered	Election/waiver Received	More than 24 hours	QR&O 108.17(2) and QR&O 108.171(1)(b)
		Pre-Trial – C	Court Martial		
21	Accused's Representation Wishes Communicated to Defence Counsel Services	Charges Direct to Court Martial or Election to Court Martial	Wishes Delivered to Defence Counsel Services	2 days	DDCS, VCDS, CAFDAC
22	Referral Application Delivered to Referral Authority	Charges Direct to Court Martial or Election to Court Martial	Application Delivered to Referral Authority	14 days	VCDS and CAFDAC
23	Referral Application Delivered to Director of Military Prosecutions	Application Delivered to Referral Authority	Application Delivered to Director of Military Prosecutions	30 days	VCDS and CAFDAC
		Summary T	rial Process		
24 25	Summary Trial Commenced Summary Trial Commenced	Alleged Offence Charge(s) Laid	Start of Summary Trial Start of Summary Trial	1 year 20 days	NDA s 163(1.1) CAFDAC
26	Summary Trial Length	Start of Summary Trial	End of Summary Trial	3 days	VCDS and CAFDAC
	All time standards relating to Milit Policies.	ary Prosecutors are established	by the Director of Military Pro	osecutions and	d are published in DMP

ANNEX G MILITARY JUSTICE TIME STANDARDS

ID	Phase of the Military Justice System	Time Starts (Date of:)	Time Ends (Date of:)	Time Standard ²	Source of Authority for Time Standard
		Court Mar	tial Process		
27	Witness List Provided	Disclosure Package Provided to Accused (or counsel)	Prosecutor Informs Accused of Proposed Witnesses	15 days	DMP Policy Directive 017/18, para 7
28	Court Martial Scheduling Discussion	Disclosure and the List of Witnesses Provided to Accused	Defence Counsel Engaged for Court Martial Scheduling	30 days	DMP Policy Directive 017/18, para 8
29	Court Martial Complete	Charge(s) Laid	End of Court Martial	18 months	R v Jordan, 2016 SCC 27
		Summary T	Trial Review		
30	Presiding Officer's Comments	Request for Review	Presiding Officer's Comments Provided	7 days	QR&O 108.45(6)
31	Presiding Officer's Comments	Request for Review	Review Authority's Decision	21 days	QR&O 108.45(10)